93-931 ①

No. 92-515

DEC 13 1993

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In The

Supreme Court of the United States

October Term, 1993

DONALD L. PRUITT, et al.,
Petitioners,

v.

HOWARD COUNTY SHERIFF'S DEPARTMENT, et al.,
Respondents.

Petition for Writ of Certiorari
to the Court of Appeals of Maryland

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. Did the Howard County, Maryland Sheriff's Department violate the first amendment rights of two deputy sheriffs who, along with many other members of the department, participated over a ten year period in a humorous parody of Nazi behavior, when it discharged these deputies after the behavior within the operation of the Sheriff's Department became the subject of a series of newspaper articles?

2. Were deputy sheriffs convicted of administrative wrongdoing by an impartial and fairly constituted administrative hearing board which recommended modest discipline denied due process of law under the Fourteenth Amendment to the United

States Constitution when the review of the administrative hearing board and the imposition of increased punishment was conducted by a newly elected Sheriff who made open, public and notorious comments before, during and after an evidentiary hearing, indicating that he prejudged the deputy sheriffs and intended to discharge them if and when elected as Sheriff?

Parties

The petitioners are Donald Pruitt, a former Major in the Howard County (Maryland) Sheriff's Department, and Dennis Pruitt, a former Sergeant in the Howard County (Maryland) Sheriff's Department.

The respondents are the Howard County (Maryland) Sheriff's Department, and Sheriff Michael Chiuchiolo.

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Official and Unofficial Reports and Opinions

The "Memorandum" (Decision and Order) of the constituted Law Enforcement Officers' Bill of Rights (hereinafter "LEOBOR") Hearing Board, dated January 7, 1991, is appended hereto. (App. 136-142).

The Memorandum of Opinion and Order of the Circuit Court for Anne Arundel County, Maryland, Eugene M. Lerner, Judge, dated May 15, 1992, is appended hereto. (App. 45-124).

The opinion of the Maryland Court of Special Appeals, captioned *Pruitt, et al. v. Howard County Sheriff's Department, et al.*, 96 Md. App. 60, 623 A.2d 696 (1993) is appended hereto. (App. 3-44).

The Order of the Maryland Court of Appeals, captioned *Pruitt et al. v. Howard County Sheriff's Department et al.*, Petition Docket No. 250, dated September

15, 1993, denying the petition for writ of certiorari, is appended hereto. (App. 1-2).

Jurisdiction of the Court

The Maryland Court of Appeals issued its Order denying certiorari on September 15, 1993.

No rehearing was requested, and no extension of time was requested.

The United States Constitution, Art. 3, Section 2, Clause 2, and 28 U.S.C. § 1257 (a) confer jurisdiction upon the Supreme Court of the United States in this matter.

Constitutional Provisions

U.S. Const., Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amend. XIV, section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

On April 12, 1990, Major Donald Pruitt and Sergeant Dennis Pruitt of the Howard County Sheriff's Department, each received a "Notification of Complaint" from the Maryland State Police. The Notification of Complaint advised Donald and Dennis Pruitt that an administrative investigation would be conducted at the request of Howard County Sheriff Herbert Stonesifer as a result of allegations -- first reported in the Baltimore Sunpapers between March 31, 1990 and April 4, 1990 -- of certain "Nazi-like behavior" at the Sheriff's Department.

Following an administrative investigation, on August 3, 1990, Donald and Dennis Pruitt were each charged with conduct unbecoming, failing to obey an order of a supervisor and willful disobedience of an order. An administrative hearing board, pursuant to the Law Enforcement Officers' Bill of Rights, Md. Ann. Code art. 27, § 727 et seq. (1992 & 1993 Supp.) was then scheduled for October 29, 1990. On October 5, 1990, an Amended Charging Document was served on Donald and Dennis Pruitt adding a fourth charge of conduct unbecoming.

The administrative Law Enforcement Officers' Bill of Rights Hearing Board was comprised of three law enforcement officers: the Sheriff of Montgomery County, Maryland, and two deputy sheriffs from other agencies equal in rank to Donald Pruitt and Dennis Pruitt respectively. The LEOBOR Hearing Board heard testimony over a six-day period from October 29, 1990 through November 9, 1990.

The trial board rendered its decision on December 12, 1990, finding each of the Pruitts guilty only as to Charge #1, i.e., conduct unbecoming. Major Donald Pruitt was found not guilty as to the other three charges against him and Sergeant Dennis Pruitt was found not guilty of the other conduct unbecoming charge against him. (Charges #2 and #3 against Dennis Pruitt were dismissed at the end of the Sheriff's Department's case for lack of evidence.)

The trial board found that Donald Pruitt, Dennis Pruitt, and many other members of the Sheriff's Department, had engaged over a ten year period of time in conduct "described as Nazi behavior and/or a parody of the old television series Hogan's Heroes." (The behavior at issue here is a combination of the uttering of German phrases and the rendering of German military salutes done in parody, satire, caricature, exaggeration, hyperbole, and mockery, but motivated in humor and not hatred or ill-will.) The trial board further found that Howard County Sheriff Stonesifer had also participated in this parody.

On January 3, 1991, the LEOBOR hearing board again convened to consider the appropriate sanction to impose in this case. The officers presented evidence of past performance, and their reputation as deputy sheriffs, in and about the courthouse, and their reputation within the community. The prosecutor recommended termination.

To appreciate the practical issues of this case, it is important to know that the behavior at issue in this case had been the focus of newspaper coverage in both the Baltimore Sunpapers and the local press. The newspaper coverage predated the internal investigation and supercharged the politics of the election race for Sheriff. As is often the case, the news articles were literally true in some respects, but communicated that the Pruitts were Nazis, rather than the truth that the Pruitts, the Howard County Sheriff, and a number of deputy sheriffs had engaged in "politically incorrect" parody. The public reaction to the "story" as it was reported in the various papers was significant and exceedingly adverse and continued throughout the pendency of this matter.

Though the decision of the LEOBOR hearing board was communicated to all parties on December 12, 1990, the trial board did not convene the "disposition hearing" until January 3, 1991, and did not transmit its "Memorandum" of findings and recommendations until January 7, 1991. Between the inception of the administrative charges and the January 3, 1991, disposition hearing, a newly elected Sheriff, Michael Chiuchiolo, was sworn and took office.

On its part, the LEOBOR hearing board believed itself to be the final arbiter in this matter, for the reason that under Maryland law, when a chief of police (or Sheriff) is an eyewitness to the incident under investigation, the decision of the hearing board, both as to findings of fact and punishment, is final. Md. Ann. Code art. 27, § 731 (d) (1) (i) (1992). In this case, Howard County Sheriff Herbert Stonesifer testified as an eyewitness to the conduct during the LEOBOR hearing board.

Believing this, the LEOBOR hearing board imposed punishment as follows: each of the Pruitts was to be reduced one grade in rank, be fined two hundred dollars ($200.00) and receive counseling. [1]

Pursuant to Md. Ann. Code art. 27, § 731 (c) (1992), newly elected Sheriff Chiuchiolo convened a hearing on January 29, 1991, to afford Donald and Dennis Pruitt an opportunity to show cause why the Board's recommendations for punishment should not be increased. On February 5, 1991, Sheriff Chiuchiolo issued a Final Order grossly increasing the penalty as to both Donald and Dennis Pruitt to termination effective February 6, 1991. The only factor in Sheriff's Chiuchiolo's Order, not considered in the trial board's decision, was the media coverage and the public reaction cited by the Sheriff.

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[1] Should either of the Pruitts desired to seek review of the decision of the LEOBOR hearing board, the decision was appealable to the Circuit Court for Howard County, Maryland pursuant to Md. Ann. Code art. 27, § 732 (1992).

An Order for Appeal was filed in the Circuit Court for Howard County. The Petition for Appeal was filed on February 15, 1991, along with a Motion for Stay and Supporting Memorandum. The case was transferred from the Circuit Court for Howard County to the Circuit Court for Anne Arundel County by the Honorable Raymond Kane, Judge, on February 26, 1991 after Howard County, Maryland circuit court judges recused themselves. After a hearing on the Motion for Stay in April, 1991, it was denied.

On May 6, 1992, argument on appeal was heard before the Honorable Eugene M.

Lerner, Judge of the Circuit Court for Anne Arundel County. On May 15, 1992, Judge Lerner issued a Memorandum Opinion and Order affirming the decision of the administrative Hearing Board and the Final Order of Sheriff Chiuchiolo.

On June 15, 1992, Donald and Dennis Pruitt filed an Order for Appeal pursuant to the right of appeal granted by Md. Ann. Code art. 27 section 732. On March 1, 1993 argument on appeal was heard in the Court of Special Appeals of Maryland. On April 29, 1993, the Court of Special Appeals issued its opinion affirming the judgment of the Circuit Court for Anne Arundel County.

On June 15, 1993, Donald and Dennis Pruitt filed a Petition for Writ of Certiorari with the Court of Appeals of Maryland. On September 15, 1993, the

Maryland Court of Appeals issued an Order denying the petition for writ of certiorari.

Two constitutional issues have repeatedly been raised by the Petitioners: first amendment freedom of speech, and fourteenth amendment due process of law. Regarding the constitutional issue of the first amendment, the issue was first raised in a Complaint and Petition to Show Cause filed in the Circuit Court for Howard County after the institution of administrative charges and before the commencement of the LEOBOR hearing board.[2]

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[2] The Maryland Law Enforcement Officers' Bill of Rights, at Md. Ann. Code art. 27, § 734 (1992) provides for a pre-hearing show cause petition to the Circuit Court for the county in which the law enforcement officer is regularly employed for an order directing the law enforcement agency to show cause why any right, including constitutional rights, should not be afforded the law enforcement officer.

The first amendment issues were revisited on appeal to the Circuit Court for Anne Arundel County in the Memorandum of Appellants.

The first amendment issues were revisited on appeal to the Circuit Court for Anne Arundel County in the Supplemental Memorandum of Appellants.

The first amendment issues were revisited on appeal to the Court of Special Appeals for Maryland in the Brief of Appellants.

The first amendment issues were revisited in the Petition for Writ of Certiorari to the Maryland Court of Appeals.

With respect to the constitutional issue of due process related to the predisposition of a decision-maker (newly elected Sheriff Michael Chiuchiolo), the issue was first raised by the petitioners in the disposition hearing before the LEOBOR hearing board on January 3, 1991 which pertained to punishment. This is the first time that the issue was ripe, and was relevant.

The fourteenth amendment issues were revisited on appeal to the Circuit Court for Anne Arundel County in the Memorandum of Appellants.

The fourteenth amendment issues were revisited on appeal to the Circuit Court for Anne Arundel County in the Supplemental Memorandum of Appellants.

The fourteenth amendment issues were revisited on appeal to the Court of Special Appeals for Maryland in the Brief of Appellants.

The fourteenth amendment issues were revisited in the Petition for Writ of

Certiorari to the Maryland Court of Appeals.

Since this case began, each decision-maker has denied each request for relief on both first and fourteenth amendment grounds each time the issues have been raised.

Argument

First Amendment Argument

In his Memorandum of Opinion and Order, Judge Lerner of the Circuit Court for Anne Arundel County, Maryland finds that the speech at issue is not one of public concern because 1) the behavior was intended as a joke; 2) the conduct was done in private settings; and 3) as to one appellant, Donald Pruitt, certain of his personal property evidenced a personal interest in Nazi Germany. In its Opinion, the Court of Special Appeals of Maryland finds that the Pruitts' speech did not concern a matter of public issue because it was intended as a joke and because it occurred in a private setting. (App. 75-76). As a result of this finding, the Court states: "...we need not balance protected speech against the Sheriff's Department's interest in protecting its credibility." (App. 79)[3].

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[3] Interestingly enough, despite its claims to the contrary, this is exactly what the Court has done, i.e., it has examined "the nature of the Pruitts' statements and actions" in conducting "an analysis of the competing claims for First Amendment protection and the need for an orderly administration of the Sheriff's Department." (App. 73). This approach is very like the alternative, and logically inconsistent, analysis of which Judge Bell warns in his dissenting opinion in *Hawkins v. Department of Public Safety and Correctional Services,* 325 Md. 621, 602 A.2d 712 (1992). However, in as much as the Court holds that the speech at issue does not touch upon a matter of public concern and, therefore, falls outside the protection of the First Amendment, Petitioners focus on this finding and note that, given this finding, all of the

Clearly, the Petitioners' ability to invoke the protection of the First Amendment is predicated on a showing that their speech is upon a matter of public concern, not, as both of the lower courts have found, upon a showing that it was made in public. *Pickering v. Board of Education*, 391 U.S. 563 (1968). The resolution of the issue of whether speech touches upon a matter of public concern so as to be within the protection of the First Amendment does not depend on a finding that establishes whether the conduct occurred in private or in public. The fact that speech is engaged in within a private setting, or directed to a limited group of fellow employees, or even

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discussion involving the balancing of competing interest is specious or, at best, premature.

to a single person, does not operate to remove that speech from the realm of public concern. *Givhan v. Western Consolidated School District*, 439 U.S. 410 (1979). Any notion that one finding specifically supports the other, as the lower courts suggest in this case, cannot be reconciled with the law as enunciated by this Court in *Givhan*.

Assuming that the lower courts' finding that the behavior was intended as a joke is entirely correct factually, such a finding is irrelevant to the issue of whether it is upon a matter of public concern such as to implicate the protection of the First Amendment. The courts have never made serious intent a substantive prerequisite to a finding of protected speech. To the contrary, the Supreme Court has long and continuously supported the notion that parody and satire are deserving of substantial freedom under the First Amendment. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541 (2nd Cir. 1964), *cert. denied*, 379 U.S. 822 (1964). Even a finding of "sheer entertainment - presumably neutral as to any political or social views" does not preclude the establishment of protected conduct. *Berger v. Battaglia*, 779 F.2d 992 (4th Cir.), *cert. denied,* 476 U.S. 1159 (1985).

Although this case involves the discharge of employees by a public employer, it is somewhat different from the classic *Pickering* fact pattern, as it involves a dismissal resulting from words and conduct in the employment setting, but which are unrelated to the substance of the employment itself. The *Pickering* analysis has been extended to this factual scenario through its application by this Court in *Rankin v. McPherson*, 483 U.S. 378 (1987). *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989). Any review of the adverse employment action must then begin with an analysis of whether the speech at issue touches upon a matter of public concern. Having so stated, as the Court of Appeals for the Eleventh Circuit has so aptly pointed out: "The meaning of the term 'public concern' is not without ambiguity, even given the Supreme Court's directive to determine whether an employee's speech addresses a matter of public concern by reviewing the 'content, form, and context of a given statement, as revealed by the whole record.' *Kurtz v. Vickrey*, 855 F.2d 723,726 (11th Cir.

1988)(quoting *Connick v. Myers*, 461 U.S. 138,147-148 (1983)).

It is undisputed that no disciplinary action of any type was initiated against either of the Petitioners until after the behavior became the focus of newspaper coverage in both the Baltimore Sunpapers and the local press. In fact, the Notification of Complaint served upon each of the Petitioners by the Maryland State Police investigator describes the details of the complaint as: "It has been reported through a series of newspaper articles in the Baltimore Sunpapers between 3/31/90 and 4/4/90, that you have been engaged in 'Nazi-like behavior'..." Both of the Petitioners at the direction of then-sheriff, Herbert Stonesifer were questioned by Michael Clark of the Baltimore Sunpapers.

This media interest in the operation of the Sheriff's Department and the behavior of the deputies therein strongly supports the Petitioners' assertion that the speech in this case touches upon a matter of public concern. The appellate courts have consistently relied upon the involvement of the media in making their assessment of the context and form of the whole record; this reliance has, in fact, been even stronger where the media attention is initiated by the reporter rather than by the speaker. *Schalk v. Gallemore,* 906 F.2d 491 (10th Cir. 1990); *Rode v. Dellarciprete,* 845 F.2d 1195 (3rd Cir. 1988); *Cheatwood v. Oxford,* 785 F.Supp. 926 (N.D. Ala. 1992). This remains true even where the employee may have a personal stake in the substance of the interview. *Rode* at 1202.

It is further undisputed that, with the publication of these newspaper articles, public interest became spirited, even heated. The disciplinary actions of the Sheriff's Department were in direct response to the publicity engendered by these events. Despite the fact that this speech had been engaged in by many members of the Sheriff's Department, including the Sheriff himself, and had continued for a period of some ten years, the punishment occurs following an investigation, the very genesis of which is explicitly attributable, by its own language, to the newspaper coverage of alleged events and implicitly attributable to the public's reaction to this newspaper coverage.

> Historically, one of the most persistent and insidious threats to first amendment rights has been that posed by the 'heckler's veto,' imposed by the successful importuning

> of government to curtail 'offensive' speech at peril of suffering disruptions of public order. Government's instinctive and understandable impulse to buy its peace - to avoid all risks to public disorder by chilling speech assertedly or demonstrably offensive to some elements of the public - is a recurring theme in first amendment litigation. Though this 'veto' has probably been most frequently exercised through legislation responsive to majority sensibilities, the same assault on first amendment values of course occurs when, as here, it is exercised by executive action responsive to the sensibilities of a minority. *Berger v. Battaglia,* 779 F.2d 992 (4th Cir. 1985), *cert. denied 476 U.S. 1159 (1985)* (citations omitted).

It is clear that even that which begins as purely a matter of personal concern, can become a matter of public concern. In *Breuer v. Hart,* 909 F.2d 1035 (7th Cir. 1990), the employee's actions, in the changing nature of his allegations, operated to elevate the dispute to one of public concern. Here, even if one accepts the premise that this speech and conduct began as a private matter, the actions of other employees, the press and the employer itself coalesced and catapulted these events into a matter of public concern. As Petitioners have previously stated, it seems incongruous that the Sheriff's Department argues that the speech at issue is unprotected because it is not upon a matter of public concern when it is public concern which formed the very basis for the investigation itself and for the disciplinary action taken against the Petitioners.

Fourteenth Amendment Argument

The Maryland Law Enforcement Officers' Bill of Rights (LEOBOR), codified at Md. Ann. Code art. 27, § 727 et seq. (1992 & 1993 Supp.) was enacted primarily to assure that certain procedural guarantees would be offered to police officers (and deputy sheriffs)[4] during any investigation and subsequent hearing which could lead to disciplinary action, demotion or dismissal. *DiGrazia v. County Executive,* 43 Md. App. 580, 406 A.2d 660 (1979), *rev'd on other grounds,* 288 Md. 437, 418 A.2d 1191 (1980); *Montgomery County Dep't of Police v. Lumpkin,* 51 Md. App. 557, 444 A.2d 469 (1982). Thus, the Petitioners have a legitimate claim of entitlement to position derived from state law and are entitled to the protection of due process afforded under the fourteenth amendment to the United States Constitution. *Board of Regents v. Roth,* 408 U.S. 564 (1972).

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[4] Specifically, subsection 727(b) defines "law enforcement officer" as any person who (1) is authorized to make arrests, and (2) is a member of one of nine classes of law enforcement agencies, including the office of the sheriff of any county.

The administrative hearing board was constituted with law enforcement officers completely uninvolved in the allegations or investigation. "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." *In Re Murchison,* 349 U.S. 133, 136 (1955); see also *Goldberg v. Kelly,* 397 U.S. 254 (1970). This administrative hearing board believed itself to be the final arbiter and was explicit in this finding:

> The Board would like to point out that the charges against the respondents (Pruitts) were brought by Sheriff Stonesifer, who was also a witness against the Respondents. Testimony indicates that he was a witness to their conduct and, on at least one occasion, participated in the offensive behavior. According to Article 27, section 732 (d)(1).
>
> 'Notwithstanding any other provisions of this subtitle, the decision of the hearing board, both as to findings of

> fact and punishment, if any is final:
>
> (i) If a chief is an eyewitness to the incident under investigation.'
>
> Therefore, the Board believes its recommendations are final; that the change in leadership in the Howard County Sheriff's Office does not permit the new Sheriff to decide otherwise. To do so, the Board believes, would only circumvent the intent of the legislature when it enacted this provision of the LEOBR (sic).

Memorandum (Decision and Order) of LEOBOR Hearing Board. (App. 140-141).

While the Petitioners quarrel with the application of the first amendment principles by the hearing board, the Petitioners have never alleged that the hearing board, or any of its members, had a disqualifying personal bias which denied them due process of law.

The Petitioners do aver that the newly-elected Sheriff, Michael Chiuchiolo, did have a disqualifying personal bias which did deny them due process of law. The Petitioners, by counsel, first attempted to make a record of the predisposition of the newly-elected Sheriff at the "Disposition Hearing" of January 3, 1991. As the transcript makes clear, it was the position of the prosecutor that the averred bias of the newly-elected Sheriff was irrelevant to the proceeding before the administrative hearing board, and such testimony was not accepted by the hearing board.

On January 29, 1991, newly-elected Sheriff Michael Chiuchiolo held two "informal hearing(s)" pursuant to Md. Ann. Code art. 27, § 731 (c) (1992). The purpose of these hearings was to permit the Petitioners to be heard before the newly-elected Sheriff raised the punishment, previously thought to be final, imposed by the administrative hearing board.

During the second hearing, with Dennis Pruitt, the newly-elected Sheriff, Michael Chiuchiolo, stated:

> ...This community is in an uproar....Neither you nor anyone else is going to tell me that I didn't probably talk, not probably, I have talked to more Howard County citizens in the past, during 1990 in the six months up to the election, than all of the ministers put together, literally thousands of people, so I do know what the feel of the community is. ... They are in an uproar, and I mean, calls still come in to this day, and that's not here nor there....

Transcript of January 29, 1991 meeting.

Following the Sheriff's decision to terminate the Petitioners, counsel for the Petitioners wrote to Sheriff Chiuchiolo and requested that he reconsider his decision on the grounds that he was predisposed to termination. Two affidavits were appended to this letter, including one from Petitioner Donald Pruitt.

The affidavits aver, inter alia, that:

a. Rabbi Martin Siegel of the Columbia Jewish Congregation told Donald Pruitt that he, Rabbi Siegel, had discussed the charges with Michael Chiuchiolo when he was a candidate for Sheriff.

b. Sheriff Michael Chiuchiolo transferred Major Donald Pruitt, and published a telephone directory with the names of Donald Pruitt and Dennis Pruitt notoriously missing, prior to any final determination of the proceedings by the LEOBOR hearing board.

c. On December 15, 1990, Sheriff Michael Chiuchiolo attended a Christmas party at the home of a state senator, and publicly commented that the former Sheriff "...should have fired them (Petitioners) right away..." and "They should be fired" or "I will fire them."

d. On December 15, 1990, Sheriff Chiuchiolo was told by two men that "if you don't fire the Pruitts, we are going to impeach you or have a recall election." Sheriff Chiuchiolo responded: "Don't you trust me," or "Don't you have confidence in me."

During the appeal of the decision of Sheriff Chiuchiolo terminating the Petitioners, their prior counsel, Mr. Michael Marshall, Esquire, filed an affidavit with the Circuit Court for Anne Arundel County, Maryland. The affidavit set forth that:

a. On January 29, 1991, counsel had an "off-the-record" conversation with newly-elected Sheriff Chiuchiolo.

b. Sheriff Chiuchiolo told counsel that he had discussed the case with Sergeant Donald Lewis (of the Maryland State Police) who had investigated the charges for the prosecution and had assisted the prosecution during the hearing board.

c. Sheriff Chiuchiolo told counsel that he had talked with various members of the community who expressed their feelings that the Petitioners should be terminated.

Petitioners recognize that mere familiarity with the facts of a case will not operate per se to disqualify a decision-maker, *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). However, personal bias, beyond mere statements on a policy issue related to the dispute, which leaves the decision-maker incapable of judging a particular controversy fairly on the basis of its own circumstances, does violate due process as the parties are entitled to an impartial decision-maker. *Hortonville Joint School District v. Hortonville Education Association,* 426 U.S. 482 (1976); *Kendall v. Board of Education of Memphis City*, 627 F.2d 1 (6th Cir. 1980); *cited in Salisbury v. Housing Authority of City of Newport*, 615 F.Supp. 1433 (D.C. Ky. 1985).

This tenet of constitutional protection has been used by the courts as the basis for examining the possible disqualification of decision-makers who might be shown to have a personal bias. *Morris v. City of Danville*, 744 F.2d 1041 (4th Cir. 1984).

Disqualifying personal bias has been found to exist where decision-makers have previously discussed an intention to terminate an employee, *Salisbury, supra*; where decision-makers have make public statements of their intentions with respect to disposition, *Staton v. Mayes*, 552 F.2d 908 (10th Cir. 1977), *cert. denied* 434 U.S. 907 (1977); where decision-makers have determined the outcome of a case before hearing all the facts, *King v. Caesar Rodney School District*, 380 F.Supp. 1112 (D. Del. 1974); and where the decision-maker has engaged in ex parte communications after the hearing, *Nevels v. Hanlon*, 656 F.2d 372 (8th Cir. 1981).

Accordingly, the Petitioners argue that in this case the decision-maker, who grossly increased the disposition to termination from long-term public sector employment was predisposed, and denied them due process of law as guaranteed by the due process clause of the fourteenth amendment to the United States Constitution.

Respectfully submitted,

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APPENDIX

DONALD L. PRUITT, * In the
et al.
* Court of
* Appeals
* of Maryland
V
* Petition Docket
No. 250
*
HOWARD COUNTY Sept. Term, 1993
SHERIFF'S DEPARTMENT, * (NO. 1086
et al. Sept. Term, 1992
* Court of Special
Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY
Chief Judge

Date: September 15, 1993

REPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1086

September Term, 1992

DONALD L. PRUITT, ET AL.

V.

HOWARD COUNTY SHERIFF'S DEPARTMENT,
ET AL.

Moylan,
Bloom,
Wenner,

JJ.

Opinion by Bloom, J.

Filed: April 29, 1993

In this case we are asked to determine whether certain "Nazi-like" comments and behavior of Major Donald Pruitt and Sergeant Dennis Pruitt, officers of the Howard County Sheriff's Department, were protected speech under the First Amendment. We are also asked to consider whether the officers were denied procedural due process and equal protection under the law when their punishment for misconduct resulted in the termination of their employment. We find no error in, and therefore affirm, the judgment of the Circuit Court for Howard County that affirmed the decision of the Sheriff of Howard County to fire appellants for misconduct.

Factual Background

On 12 April 1990, Major Donald Pruitt

and Sergeant Dennis Pruitt each received notification from the Maryland State Police advising them that they were currently under investigation for misconduct as a result of allegations of Nazi-like conduct reported in the Baltimore Sunpapers between 31 March 1990 and 4 April 1990.[1] On 3 August 1990 the Pruitts were each charged with conduct unbecoming (officers], failure to obey an order of a supervisor, and willful disobedience of an order.

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[1] The conduct ranged from parodies of "Hogan's Heroes," including imitations of "Colonel Klink" and "Sergeant Schultz," exaggerated German accents, exaggerated military mannerisms such as the German Hitler hand salute and heel clicks, to the use of terms like "achtung" and "sieg heil." The alleged conduct, which occurred within the presence of Howard County Sheriff's Department employees and courthouse personnel, was apparently intended solely for amusement.

Pursuant to the Law Enforcement Officers,' Bill of Rights (LEOBR), Md. Ann. Code Art. 27, § 727 (1957, 1992 Repl. Vol.), an administrative hearing board was scheduled to convene on 29 October 1990. On 5 October 1990 an amended charging document was served on the Pruitts, adding a fourth charge of conduct unbecoming.

The administrative hearing board, with Sheriff Raymond Kight of Montgomery County presiding, heard testimony from 29 October to 9 November 1990 and ultimately rendered its decision on 12 December 1990. At that time the board found each of the Pruitts guilty of the first charge of conduct unbecoming and not guilty of the other three counts. On 3 December Herbert Stonesifer was replaced by Michael Chiuchiolo as Sheriff of Howard County. During the hearing, Sheriff Stonesifer had testified as an eyewitness to the alleged conduct.

On 3 January, 1991, the administrative hearing board conducted an additional hearing to consider the past performance of the Pruitts preliminary to recommending punishment. On 7 January, 1991, the board recommended that each of the Pruitts be demoted in rank, fined two hundred dollars, and receive counseling. Sheriff Chiuchiolo, after conducting a show cause hearing to determine whether punishment should not be increased, issued an order on 5 February, 1991, terminating the Pruitts' employment effective 6 February, 1991.

An appeal to the Circuit Court for Howard County from the Sheriff's decision and a motion to stay were filed, and the case was transferred to the Circuit Court for Anne Arundel County. The motion for stay was denied after a hearing in April 1991, and it is from that order that this appeal was taken.

Appellants present the following questions for our consideration:

> 1. Did the lower court err when it found that the decision of the hearing board was legal because: a) the Pruitts' behavior was not protected by the free speech guarantees of the First Amendment of the United States Constitution and Md. Ann. Code Art. 27 section 733 (1992); b) the Pruitts were given adequate notice of the charges against them within the meaning of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Md. Ann. Code Art. 27 section 733 (1992); c) singling the Pruitts out from other participants in the conduct did not violate their rights to equal protection under the Fourteenth Amendment of the United States Constitution and Md. Ann. Code Art. 27 section 733 (1992); and d) charges against the Pruitts were timely filed within the requirements of Md. Ann. Code Art. 27 section 730(b)(1992)?
>
> 2. Did the lower court err when it found that the order of Sheriff

Chiuchiolo was legal because it was within his authority to increase punishment and because it did not implicate the Pruitts' First Amendment rights nor violate their Due Process or Equal Protection rights under the Fourteenth Amendment to the United States Constitution and Md. Ann. Code Art. 27 sections 731(c) and 733 (1992)?

Protected Speech

It is well established that a state may not discharge an employee if such discharge would infringe the employees constitutionally protected right of freedom of speech. *Branti v. Finkel,* 445 U.S. 507, 515-16, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980); *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972) ; *Pickering v. Board of Ed. of Township High School Dist.* 205, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *Keyishian v. Board of Regents of University of State of N.Y.,* *385* U.S. 589, 605-06, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967). The Maryland Legislature has made specific provision for the protection of the constitutional rights of Maryland law enforcement officers:

> A law-enforcement officer may not be discharged, disciplined, demoted, or denied promotion, transfer, or reassignment, or otherwise discriminated against in regard to his employment or be threatened with any such treatment, by reason of his exercise of or demand for the rights granted in this subtitle, or by reason of the lawful exercise of his constitutional rights.

Md. Ann. Code Art. 27, § 733 (1957, 1992 Repl. Vol.).

The determination of whether a public employee has been improperly discharged for engaging in protected speech requires "a balance between the interests of the (employee), as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in prompting the efficiency of the public services it performs through its employees." *Pickering, 391* U.S. at 568. See also *Connick v. Myers, 461* U.S. 138, 140, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) . "[Debate on public issues should be uninhibited, robust, and wide-open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v.* Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Because debate on issues of public concern is imperative to the functioning of the American system of government, the Pickering test is designed to ensure that a governmental employer does not chill the public debate essential to this form of governance. *Arvinger v. Mayor of Baltimore,* 862 F.2d 75, 78-79 (4th Cir. 1988). With respect to government employees, only speech that is within the scope of the First Amendment and addresses a matter of public concern is entitled to constitutional protection. *Berger v. Battaglia,* 779 F.2d 992, 998 (4th Cir. 1985), *cert*. denied, 476 U. S. 1159, 106 S. Ct. 2278, 90 L. Ed. 2d 720 (1986).

When an expression does not relate to "any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146. Thus if the expression "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for... discharge." *Connick,* 461 U.S. at 146. If we do not find the speech to concern public issues, we do not reach the balancing test.

As pointed out by Justice Marshall in *Rankin v. McPherson,* 483 U.S. 378, 384, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987), reh'g denied, 483 U.S. 1056, 108 *S.* Ct. 31, 97 L. Ed. 2d 819 (1987), the threshold question for determining whether a dismissal is appropriate is whether the speech was "on a matter of public concern." "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.[2] *Connick,* 461 U.S. at 147-48.

The Maryland Court of Appeals first applied this analysis in *DiGrazia v. County Exec. for Mont. Co.,* 288 Md. 437 (1980), where the Court concluded that the test formulated in *Pickering* was applicable only if the employee demonstrated that his conduct was constitutionally protected. In *De Bleeker v. Montgomery Co.,* 292 Md. 498 (1982), the Court of Appeals concluded that the evidence establishing that the employee had been dismissed because of his constitutionally protected conduct was in conflict and, therefore, summary judgment was inappropriate. The application of the Pickering balancing test, which requires a determination of whether the alleged conduct was constitutionally protected, was later refined in *O'Leary v. Shipley,* 313 Md. 189 (1988).

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[2] In a footnote to the *Connick* opinion the Supreme Court noted that the standard for determining whether an expression is of legitimate concern to the public is the same as that for determining the presence of a common law tort action for invasion of privacy. *Connick*, 461 U.S. at 143 n. 5, citing Restatement (Second) of Torts § 652D (1977), Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1027, 43 L. Ed. 2d 378 (1975), and Time, Inc. v. Hill, 385 U.S. 374, 387-88, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967).

In our analysis of the competing claims for First Amendment protection and the need for an orderly administration of the Sheriff's Department, we shall examine the nature of the Pruitts' statements and actions. Like *Berger v. Battaglia,* 779 F.2d 992 (4th Cir. 1985), *cert.* denied, 476 U. S. 1159, 106 S Ct. 2278, 90 L. Ed. 2d 720 (1986), in which a Baltimore City police officer was ordered to stop performing Al Jolson songs in black-face, this case does not fit within the traditional employee speech pattern -- i.e., cases where the employee criticizes the employer's policy, actions, or supervision. *Berger*, 779 F.2d at 997. Although the Pruitts did not criticize the Sheriff's department, they did imitate or parody "Hogan's Heroes" while in uniform. Thus, "the employee speech was not criticism of or disagreement with governmental operations" but did affect the department's internal operation and public image. The State's interests as an employer in regulating the speech of its employees "differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 U.S. at 568.

In *Hawkins v. Department of Public Safety & Correctional Services*, 325 Md.

621 (1992), the Court of Appeals held that dismissal of a prison guard for his use of ethnic epithets was reasonable based on the State's apprehension of disruption and possible violence at the correctional institution. After an incident in which the bank refused to cash the guard's payroll check the guard stated to the head cashier, "Hitler should have gotten rid of all you Jews" and later continued, "and all the Poles too." The Court concluded that the speech was personal and not one concerning public issues:

> Clearly, Hawkins (the guard) was not attempting to stimulate a dialogue on the Holocaust. He was giving vent to his anger, and, relying on his fallible ability to identify persons of Jewish heritage, he used speech as a weapon to abuse the teller who had inconvenienced him.... No balancing is required because the threshold requirement of speech on a matter of public concern has not been met.

Hawkins, 325 Md. at 633.

Upon review of the Pruitts' actions in light of their content, form, and context, we are compelled to conclude that such conduct is not speech on a matter of public concern. The Pruitts testified at the administrative hearing that their conduct was humorous in nature and intended as a joke -- as a parody of Hogan's Heroes. Appellants' speech did not, by their own admission, contain any allegations of wrongdoing or present issues of public concern to the community. Instead, it was intended for amusement, bereft of any political content. In contrast to instances where the courts have found that the speech concerned public issues, this case concerns actions and statements not intended to provoke debate or made in reference to a public issue of the time. Compare *Rankin*, 483

U.S. at 2895 (employee commenting on an attempt to assassinate President Reagan).

In this case, the speech itself was made to other Sheriff department employees and employees of the Howard County courthouse. It was intended as a joke rather than a social commentary. The conduct occurred in a "private setting" -- generally away from the public view -- a fact that supports our conclusion that the speech is private. Compare *Berger*, 779 F.2d at 999 (concluding that because the black-face performances were made to the public and admission was sometimes paid the performances "constituted speech upon a matter of obvious public interest to those considerable segments of the community who willingly attended").[3]

Here the speech and conduct remain unprotected because they did not concern a matter of public interest but instead indicated a personal bias. As the Supreme Court noted in *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 62 S. Ct. 766, 769, 86 L. Ed. 1031, 1035 (1942), citing *Cantwell v. Connecticut,* 310 U.S. 296, 309-10 (1940):

> Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution....

Because we find that the Pruitts' speech did not concern a matter of public issue we do not reach the second prong of the analysis; we need not balance protected speech against the Sheriff's department's interest in protecting its credibility.

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[3] We distinguish *Berger* from. the instant case on the grounds that although both cases involved racism the context and form are substantially different. A performance for which an admission price is paid differs in kind and magnitude from a parody acted out for the benefit of co-workers and court personnel.

Adequate Notice

Appellants contend that the trial court erred in finding that the Pruitts were given adequate notice of the charges against them within the meaning of the Due Process Clause. They further allege that Sheriff Stonesifer's testimony that appellants' Nazi-like conduct constituted behavior unbecoming an officer supported the first charge; Sheriff Stonesifer later stated that this same conduct constituted a failure to obey an order, thereby supporting the second and third charges.

In our view Sheriff Stonesifer's apparent confusion does not constitute a lack of notice under the procedural due process requirements.

Under the Law Enforcement Officers' Bill Of Rights (LEOBR), any law enforcement agency contemplating punitive action against an officer "shall give notice to the law enforcement officer... (of] the issues involved." Md. Ann. Code Art. 27, § 730 (a) (1957, 1992 Repl. Vol.). In *Reed* v. *Mayor and City Council of Baltimore,*. 323 Md. 175, 184 (1991), the Court of Appeals stated that the purpose of the notice requirement is to "apprise the officer of the charges warranting disciplinary action in sufficient detail to enable the officer to marshal evidence and arguments in defense of the assertions."

In the instant case both appellants were served with a departmental charging document and departmental findings of fact, the first paragraph of which states:

> During the course of your employment with the Howard County Sheriff's Department, you have engaged in a course of conduct by exhibiting Nazi-like behavior and uttering certain german words and phrases, throughout the courthouse complex within view of the public, that has been inappropriate, unbecoming and reflects unfavorably on the department. This conduct has continued even though it has been brought to your attention that it was offensive and irritating to fellow employees. Additionally, you were ordered on at least two occasions, to [sic) once by Ex-Sheriff Donnelly during her term of office and once by current Sheriff Stonesifer, approximately two years ago, to discontinue the Nazi behavior in the workplace. This order by a superior officer was disobeyed.

On 5 October 1990 an amended charging document and departmental findings of fact, essentially the same in substance, were served on the Pruitts. In addition to the findings stated above the amended findings also included:

> By misusing the authority of your position, you have also engaged in a course of conduct that has adversely effected {sic) the morale of the department and undermined the good order, efficiency and discipline of the department.

Appellants claim that this Court must necessarily find that "where there exists a disagreement in the meaning of a charge between the charging supervisor and a prosecutor at a point later in time" the meaning of the charges must be explained prior to the hearing to meet the due process requirement. We believe that appellants have misconstrued the meaning of due process under the case law.

We distinguish *Reed* from the case at bar based upon the nature of the charges. In *Reed* the police officer was charged with "reflecting discredit upon the Baltimore Police Department and/or herself as a member thereof." This charge failed to indicate what actions comprised either the incident or the conduct reflecting discredit upon the department. In the instant case appellants were each charged with conduct specifically identified as "Nazi-like behavior" including the use of German words and phrases. In the second and third charges appellants were charged with failing to comply with a superior's order instructing them to stop this behavior. Finally the fourth charge centered on appellant's misuse of their position while engaged in this conduct, adversely affecting the efficiency, moral order, and discipline of the Sheriff's department. Based upon these charges, the Hearing Board found appellants guilty of conduct unbecoming (charge one) based upon appellants' demonstrated Nazi-like conduct. We believe that appellants were provided with the factual basis for the charges and therefore given sufficient notice to enable them to "marshal evidence and arguments in defense of the assertions."

Equal Protection

Appellants also contend that their rights to equal protection under the law were abridged because other Sheriff's department employees who engaged in similar Nazi-like conduct were not also charged with this offense. The record does not support appellants' contention that other employees were in a situation approximate to appellants'. We also note that the decision to charge only appellants with this offense meets the rational basis test. Appellants raised the equal protection argument before Judge

Lerner, who ruled that a rational basis existed for the disparate treatment.[4]

The Court of Appeals recently reviewed the prevailing interpretations of the equal protection clause in *Murphy v. Edmonds,* 325 Md. 342 (1992). A classification that burdens a suspect class or impinges upon a fundamental right receives strict scrutiny; a classification that burdens a quasi-suspect class or impinges upon important personal rights receives heightened or intermediate scrutiny; and a classification that does not involve either a suspect or quasi-suspect class and does not infringe any fundamental or important personal right must receive scrutiny under the rational basis test. *Murphy,* 325 Md. at 356-58.

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[4] Judge Lerner declined to find that appellants' First Amendment rights had been violated and accordingly refused to give this allegation the higher level of scrutiny afforded to fundamental rights. Although mere failure to prosecute other offenders is no basis for a finding of a denial of equal protection, selective prosecution may not be based upon clearly impermissible discriminatory grounds such as race, religion, or the exercise of First Amendment rights to free speech. United States v. Blitstein, 626 F.2d 774, 782 (10th Cir.), *cert denied*, 449 U.S. 1102, 101 S. Ct. 898, 66 L. Ed. 2d 828 (1980).

There is, of course, no need to engage in the strict scrutiny/heightened scrutiny/rational basis analysis unless there is a showing that similarly situated individuals received disparate treatment.

Appellants cannot succeed on their equal protection claim unless they can show that other, similarly situated individuals did not receive the same treatment, i.e., they were not subject to like punishment for like behavior. Appellants have not met this threshold requirement. The evidence presented to the hearing board shows that no other employee of the Howard County Sheriff's department engaged in the alleged Nazi-like activity to the same degree as appellants. The evidence also shows that the Pruitts were the second and third highest ranking officers of the department and thus were in substantially different positions than the remainder of departmental employees. Donald Pruitt served as Chief Deputy and supervised all elements of the department, handled complaints and implemented the orders of the Sheriff. Dennis Pruitt served as Sergeant and as departmental internal affairs officer as well as supervised the deputies assigned to road work.

The evidence presented included testimony by eleven witnesses that they had never observed anyone other than appellants engaging in Nazi-like conduct.

Several deputies testified that they had on occasion observed other deputies return a Nazi salute to the Pruitts. The testimony showed that appellants had engaged in this conduct on a daily basis for a period of ten years.

Appellants rely upon *Zeigler v. Jackson,* 638 F.2d 776 (5th Cir. 1981), to support their contention that the disparate treatment of the Pruitts was not related to the objectives of the regulations under which they were charged. In *Zeigler* a police officer was terminated from employment based upon a prior criminal conviction while three other police officers similarly situated were retained. In reaching its decision the court stated:

> We agree with the district court that the equal protection clause does not require that all persons be treated identically. However, if distinctions between similarly situated individuals are to withstand equal protection analysis, such distinctions must be reasonable, not arbitrary, and must rest on grounds having a fair and substantial relation to the object of the legislation.

Zeigler, 638 F.2d at 779. Because the police commission failed to show a rational justification for the disparate treatment the court concluded that the termination of Zeigler's employment violated his right to equal protection under the law.

We distinguish *Zeigler* from the instant case based upon the facts. The evidence does not show that any other members of the department were similarly situated to appellants. No other employees were engaged in Nazi-like conduct with the frequency and duration that the

Pruitts engaged in it; the Pruitts, unlike the others, were high ranking officers charged with the supervision of other deputies.

Under the rational basis test we also find no violation of the Pruitts' rights to equal protection. The rational basis test requires that a classification be declared unconstitutional only if the "varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that (the court] can only conclude that the [governmental] actions were irrational." *Murphy,* 325 Md. at 355 quoting *Gregory v. Ashcroft,* _____ U.S.____ , 111 S. Ct. 2395, 2406, 115 L.Ed.2d 410, 430 (1991). Based upon the weight of the evidence concerning the frequency and duration of the Pruitts' activities, and in light of the Department's legitimate interest in bringing disciplinary actions against officers who violate regulations, we find no violation of appellants' right to equal protection under the law.

Timeliness of Charges

Appellants argue that the charges filed on 8 August 1990, and amended on 5 October 1990, were filed after the one year limitations period codified in Article 27, Section 730 (b)(1), which provides in pertinent part:

> Administrative charges may not be brought against a law enforcement officer unless filed within 1 year after the act that gives rise to the charges comes to the attention of the appropriate law enforcement agency official.

Appellants further contend that within the meaning of the statute the appropriate law enforcement agency official, Sheriff Stonesifer, "knew, or should have known, of the course of conduct no later than February of 1988."

A review of the facts leads us to conclude that the record supports Sheriff Stonesifer's testimony that he did not become aware of the recurring conduct until March 1990. Sheriff Stonesifer testified that the first time he observed the Nazi conduct was in March of 1990 when he saw Dennis Pruitt give a salute, i.e. "threw his arm up." Stonesifer indicated that Donald Pruitt, on another occasion, had come into the Sheriff's office, clicked his heels, and addressed the Sheriff as "Herr Major," but that Stonesifer did not ascribe any significance to the event at that time.

Sheriff Stonesifer had earlier

received a complaint about the Nazi conduct in 1988, at which time he directed Donald Pruitt to stop engaging in that behavior. Stonesifer testified that he received no further complaints until approached by a newspaper reporter in March 1990. Appellants argue that Stonesifer first became aware of the conduct in 1988, causing the statute of limitations to run. When the Sheriff first received a complaint in 1988, he ordered Donald Pruitt to cease his Nazi-like behavior at that time, which, we believe, was an appropriate disposition of what seemed to be an isolated incident.

Upon learning that his order had been disobeyed and that the conduct continued, Stonesifer initiated an investigation that resulted in the filing of charges against appellants in August of 1990, a little less than five months after the recurring misconduct was brought to the attention of Sheriff Stonesifer. Because Sheriff Stonesifer had no knowledge of the continuing nature of appellants' acts, the statute of limitations did not begin to run until their conduct was brought to his attention. Whether Sheriff Stonesifer had a duty to use due diligence to discover this conduct is not properly before us; Sheriff Stonesifer testified that he had no knowledge of and received no complaints of misconduct until March 1990. Based on those facts, we find that the charges were timely filed within the one year limitation.

Authority to Increase Punishment

Appellant argues that because Sheriff Stonesifer was an eyewitness to appellants' misconduct under Article 27, Section 731(d)(1)(i), the new chief, Sheriff Chiuchiolo, is bound by the hearing board's recommendation to Sheriff Stonesifer. We agree with the trial judge's interpretation of Section 731(d) as precluding a chief who was personally involved in an incident from exercising any authority over the punishment instated. This construction ensures that the disciplinary proceeding is not tainted by unfair prejudice or bias.

Section 731(d)(1) provides in pertinent part:

> Notwithstanding any other provisions of this subtitle, the decision of the hearing board, both as to findings of fact and punishment, if any, is final:
>
> (i) if a chief is an eyewitness to the incident under investigation. . . .

Under the facts of this case the chief vested with the authority to change the recommended punishment is not the chief who was an eyewitness to the incident. We agree that in cases in which a new chief takes office during the disciplinary process there is no rational basis for confining his or her authority to alter the board recommended policy. Because Sheriff Chiuchiolo was not an eyewitness to this event, the written recommendations of the board were not binding on him. In order to increase this recommendation, the Sheriff must personally review the entire record of the hearings board proceedings, permit the law enforcement officer to be heard, and state the reason for increasing the recommended penalty. Md. Ann. Code, Art. 27, § 731(c). Sheriff Chiuchiolo complied with these requirements by reviewing the record, conducting a show cause hearing, and indicating that he was increasing the penalty because of his concerns about integrating the Pruitts into the work place, respect for them by their subordinates, and whether they would fit into his management scheme for the department. Because the Law Enforcement Officers' Bill of Rights does not preclude a chief from dismissing an officer notwithstanding a recommendation by the hearing board for a lesser punishment, *Police Comm'r v. Dowling,* 281 Md. 412 (1977), we find no error in the circuit court's affirmance of Sheriff Chiuchiolo's decision to exercise his authority to increase punishment and terminate the Pruitts' employment with the Sheriff's department.

Increase in Punishment was not Violative of Due Process

Appellants contend that their

procedural due process rights were violated by Sheriff Chiuchiolo's demonstrated bias against them and his predetermined decision to increase their penalty. We find no support for that contention in the record and accordingly affirm the circuit court's decision to affirm the increase in punishment.

Appellants rely upon case law that holds that factfinders, in determining guilt or innocence, must be impartial. The cases they cite, however, do not require individuals who impose penalties to be impartial. While the code attempts to protect the officer from unfairness by precluding a chief who was part of the incident from altering the recommendations of the hearing board, it does not require that the chief who imposes the penalty have no opinion or previous knowledge of the case. In *Hortonville Joint School District No. I v. Hortonville Ed. Ass'n,* 426 U.S. 482, 493, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976), the Supreme Court explained:

> Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify the decision maker. Nor is a decision maker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not "capable of judging a particular controversy fairly on the basis of its own circumstances. (Citations omitted.)

See also Hoyt v. Police Comm'r of Baltimore City, 279 Md. 74, 86-88 (1977). Furthermore, the cases relied upon by appellants required a demonstrated bias of a personal or financial stake in the decision, or some personal bitterness regarding the subject of the decision. *See e.g., Hortonville, supra.* In this case there has been no evidence of bias rising to that level.

Appellants offered three affidavits to show that Sheriff Chiuchiolo was biased against them. Appellant Donald Pruitt stated that Chiuchiolo had discussed the charges with Rabbi Siegel during his election campaign, and had stated that he would deal with the charges against the Pruitts if the hearing board did not. Charles J. Sikorsky, Jr., stated that he heard Sheriff-elect Chiuchiolo state, at a Christmas party, that Stonesifer should have fired appellants and that he intended to do so. Michael Marshall, appellants' counsel, stated that Chiuchiolo had indicated that he had discussed the case with the investigator and had talked to members of the community who felt appellants should be terminated.

These affidavits do not reveal a personal or financial interest in the case or any bitterness towards appellants. Sheriff Chiuchiolo's opinion of the situation does not constitute bias -- he discussed this issue as a candidate running for the office of Sheriff and in social situations. Generally there is a presumption of honesty and integrity in policy makers with decision making power. *Withrow V. Larkin, 421* U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L. Ed. 2d 712 (1975). Chiuchiolo's statements indicate that he regarded the allegations about appellants' conduct to be of major importance to the Sheriff's office and that he intended to deal with the matter promptly if the hearing board did not. His comments did not clearly reveal a disqualifying bias or personal bitterness against appellants.

Summary

We hold that appellants' Nazi-like conduct did not concern public issues and therefore does not warrant First Amendment protection, that the charges of misconduct against appellants were timely and gave adequate notice of the issues, that appellants' rights to equal protection of the law were not violated, and that Sheriff Chiuchiolo acted within his authority and discretion in terminating appellants' employment. Accordingly, we affirm the judgment of the circuit court.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANTS

IN THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY

DONALD L. PRUITT, *
et al.
*
Appellants
* Case No. 1124530
v.
*
HOWARD COUNTY
SHERRIFF'S DEPT., *
et al.
*
Appellees

* * * * * * * * * * *

MEMORANDUM OF OPINION AND ORDER

This matter comes before the Court as an appeal from the December 12, 1990 Decision of the Law Enforcement Officer's Administrative Hearing Board (hereinafter "the Hearing Board") and the February 5, 1991 Final Order issued by Sheriff Michael A. Chiuchiolo (hereinafter "Sheriff Chiuchiolo") of Howard County, Maryland.

All proceedings in this case have

been conducted pursuant to the Law Enforcement Officer's Bill of Rights (hereinafter "LEOBR") contained in Md. Ann. Code art. 27, §727-734D (1992). Throughout this opinion this Court shall collectively refer to the Appellants as "the Pruitts" and the Appellees as "the Sheriff's Department."

In April of 1990 a series of articles appeared in The Baltimore Sun accusing Major Donald L. Pruitt (hereinafter "Major Pruitt") and Sergeant Dennis L. Pruitt (hereinafter "Sergeant Pruitt") both of the Howard County Sheriff's Department (herein "the Sheriff's Department"), of engaging in Nazi-like behavior while on duty.

An investigation was initiated on April 2, 1990 by then Sheriff Herbert L. Stonesifer (hereinafter "Sheriff

Stonesifer") of the Sheriff's Department. The Pruitts were notified on April 12, 1990 that a Complaint had been filed against them and that they would be investigated.

On August 3, 1990 the Pruitts were notified of the following Departmental Findings of Fact:

> During the course of your employment with the Howard County Sheriff's Department you have engaged in a course of conduct by exhibiting Nazi-like behavior and uttering certain germanic words and phrases, throughout the courthouse complex within view of the public, that has been inappropriate, unbecoming and reflects unfavorably on the department. This conduct has continued even though it has been brought to your attention that it was offensive and irritating to fellow employees. Additionally, you were ordered on at least two occasions, to [sic] once by ex-Sheriff Donnelly during her term of office and once by current Sheriff Stonesifer, approximately two years ago, to discontinue the Nazi behavior in the workplace. This order by a superior officer was disobeyed.

Departmental Findings of Fact at 1.

In addition, also on August 3, 1990, the Pruitts were notified that the following three Departmental charges had been filed against them: 1) Conduct unbecoming, 2) Disobeying an order of a supervisor, 3) Willful disobedience of an order. In the Sheriff's Department General Order Manual, "Conduct Unbecoming" is defined as follows:

> Any breach of the peace, neglect of duty or misconduct on the part of any personnel of this department, either within or outside of Howard County, which tends to undermine the good order, efficiency, or discipline of the department, even though these offenses may not be specifically set forth, shall be considered conduct unbecoming.

Howard County Sheriff's Department General Order Manual, Section II, Code of Conduct, at 10.

A Hearing Board was set for October 29, 1990 pursuant to Md. Ann. Code art.

27, §730(a)(1992).

On October 5, 1990 an Amended Departmental Charging Document and Amended Departmental Findings of Fact were served on each of the Pruitts. A fourth charge for conduct unbecoming was added. The Amended Departmental Findings of Fact stated:

> During the course of your employment with the Howard County Sheriff's Department you have engaged in a course of conduct by exhibiting Nazi-like behavior and uttering certain German words and phrases, throughout the courthouse complex and within view of the public, that has been inappropriate and unbecoming; that has reflected unfavorably on the department; and has undermined the good order, efficiency and discipline of the department.
>
> You were ordered on at least two occasions, once by Ex-Sheriff Donnelly during her term of office, and once by current Sheriff Stonesifer approximately two years ago, to discontinue the Nazi-like behavior in the work place. You disobeyed and continued to disobey these orders by a superior officer.

> By misusing the authority of your position, you have also engaged in a course of conduct that has adversely effected [sic) the morale of the department and undermined the good order, efficiency and discipline of the department.

Amended Departmental Findings of Fact.

On October 29, 1990, the Hearing Board consisting of the following members convened: 1) Sheriff Raymond M. Kight, Montgomery County Sheriff's Department, sitting as Chairman, 2) Jesse Bane, sitting as Board Member and 3) Wilson Knight, sitting as Board Member. Testimony was heard over a series of days ending November 9, 1990. Sheriff Stonesifer testified as an eyewitness to the incidents giving rise to the charges.

Michael A. Chiuchiolo became the new Howard County Sheriff on December 3, 1990.

On December 12, 1990 the Hearing Board released its decision:

Respondent--Major Donald Pruitt

Charge One - Guilty (Sustained)
Charge Two - Not Guilty
Charge Three - Not Guilty
Charge Four - Not Guilty

Respondent--Sgt. Dennis Pruitt

Charge One - Guilty (Sustained)
Charge Two - Not Guilty - Dismissed by Board
Charge Three - Not Guilty - Dismissed by Board
Charge Four - Not Guilty

Letter to Michael Marshall, Esquire, December 12, 1990. Charges Two and Three against Sergeant Pruitt were dismissed by the Hearing Board for lack of evidence.

On January 3, 1991 the Hearing Board held a past performance hearing pursuant to Md. Ann. Code art. 27, §731 (a) (1992), to consider the Pruitts' past performance and other relevant information as factors before submitting their recommendations for punishment to Sheriff Chiuchiolo.

On January 7, 1991 the Hearing Board made the following recommendations as to punishment:

> 1) Both Sergeant Dennis Pruitt and Major Donald Pruitt be reduced in rank to the next lowest rank.
>
> 2) Both be fined in the amount of $200.00 each.
>
> 3) Both be required to undergo counseling by a professional that addresses cultural or sensitivity awareness; and that Howard County government determine whom this professional will be.

Memorandum to Sheriff Michael Chiuchiolo, January 7, 1991, at 3. The Board additionally recommended in the text of its opinion that Sheriff Chiuchiolo address the inadequacies in professionalism manifest in this conduct and the attitudes of other deputies in the employ of the Sheriff's Department. Id. The Board stated that it believed its decision was final pursuant to the following provision in the LEOBR:

> (d)(1) Notwithstanding any other provisions of this subtitle, the decision of the hearing board, as to findings of fact and punishment, if any, is final:
>
> (i) If a chief is an eyewitness to the incident under investigation.

Md. Ann. Code art. 27, § 731(d)(1)(i) (1992). See Memorandum to Sheriff Michael Chiuchiolo, January 7, 1991, at 2-3. As noted previously, Sheriff Stonesifer testified before the Hearing Board as an eyewitness and participant.

The Pruitts were informed by letter dated January 22, 1991 that Sheriff Chiuchiolo was considering an increase in the punishment the Hearing Board had recommended. On January 29, 1991 the Pruitts met with Sheriff Chiuchiolo and their counsel, pursuant to Md. Ann. Code Art. 27, § 731(c) (1992) to discuss this possibility of an increase in punishment.

By Final Order dated February 5, 1991, Sheriff Chiuchiolo terminated the employment of both Pruitts at the Sheriff's Department, effective February 6, 1991. He rejected the Hearing Board's contention that their recommendations constituted a final decision by virtue of Sheriff Stonesifer's eyewitness testimony saying, "The fact that former Sheriff Stonesifer may have personally observed such conduct is irrelevant. I am the Sheriff and the final decision is mine under the law." Final Order of Sheriff Chiuchiolo, February 5, 1991, at 4. Sheriff Chiuchiolo gave the following reasons for increasing the punishment:

> The Trial Board aptly described your actions as 'offensive, outrageous, and conduct unbecoming supervisory law enforcement officials in the work environment.

> As a direct result of your actions, you have fractured the infrastructure of the Sheriff's Office, brought the Department into disrepute and outraged the citizens of Howard County.
>
> To accept the Trial Board's recommendations and integrate you back into the organization even as deputies, let alone as supervisors, would demoralize the employees, seriously hamper the efforts to rebuild the supervisory structure and change the direction and attitudes envisioned as necessary to instill a new sense of internal pride and community respect.
>
> As an example of how your actions affected this Department, the Circuit Court which this Department serves, and the citizens of Howard County, one need only look at the media coverage of your actions and the many letters and expressions of outrage from community leaders.

Final order of Sheriff Chiuchiolo, February 5, 1991 at 2.

An order for Appeal was filed on behalf of the Pruitts in the Circuit Court for Howard County and the case was assigned No. 91-CA-15453.[1] A Petition for Appeal followed on February 15, 1991. A Motion for Stay and Supporting Memorandum was also filed on behalf of the Pruitts on February 15, 1991.

Docket entries were received in the Circuit Court for Anne Arundel County from Margaret D. Rappaport, Clerk of the Circuit Court for Howard County on March 6, 1991.

A Response to the Motion to Stay and Supporting Memorandum was filed March 21, 1991 by the Attorney General's office on behalf of the Sheriff's Department.

A Certificate of Record was filed by

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[1] Judge Raymond Kane, Associate Judge for Howard County, by Order dated February 26, 1991, transferred this case to this Court as each of the Judges in the Circuit Court for Howard County had recused himself. Thereafter, this case has been numbered C-92-05279, Circuit Court for Anne Arundel County.

Major Charles M. Cave, Chief Deputy, Howard County Sheriff's Office on April 2, 1991. A Transcript of Proceedings before the Hearing Board was filed with the Circuit Court for Anne Arundel County on April 2, 1991.

On April 8, 1991, counsel and the parties appeared before this Member of the Court on the Motion to Stay. Arguments were heard. The Court denied the motion and directed Mark H. Bowen, Assistant Attorney General appearing on behalf of the Sheriff's Department, to prepare the Order. This Order was signed on April 11, 1991 by this Member of the Court.

On April 29, 1991 the parties filed a Stipulation to Extend Time for Filing Appellant's Memorandum. Under the extension, the Pruitts had until May 16, 1991 to file. The Memorandum of

Appellants with attachments was duly filed with the Court on June 4, 1991.

The parties filed a Stipulation to Extend Time for Filing Appellee's Memorandum on July 8, 1991. The parties set a deadline of August 9, 1991. Memorandum of Appellees was filed August 7, 1991.

A Supplemental Memorandum of Appellants was filed with the Court on May 1, 1992.

On May 6, 1991(sic, 1992), counsel appeared before this Member of the Circuit Court for Anne Arundel County. Following the presentation of oral arguments, the Court held the matter sub curia.

STANDARD OF REVIEW

This Court's powers over this appeal are limited by the safeguards provided in the LEOBR, Md. Ann. Code Art. 27 §727-734 (1992) and the Administrative

Procedures Act, Md. State Govt. Code Ann. §10-201 - 10-217 (1984 & Supp. 1991). Additionally, this Court is bound procedurally by subtitle B of Chapter 1100 of the Maryland Rules. See Commissioner, Baltimore City Police Department v. Cason, 34 Md. App. 487, 368 A.2d 1067. (1977) cert. den. 280 Md. 728 (1977); Md. Ann. Code Art. 27, §732 (1992).

The Court of Appeals has stated that when sitting on an administrative appeal this Court is constrained to view the decision of an agency - here the Hearing Board and Sheriff Chiuchiolo acting jointly - in the light most favorable to the agency since "'decisions of administrative agencies are prima facie correct' Hoyt v. Police Commissioner, 279 Md. 74, 88-9, 367 A.2d 924 (1977) and 'carry with them a presumption of validity' Dickinson-Tidewater, Inc. v. Supervisor, [supra] 273 Md. [245] at [sic] 256, 329 A.2d 18 [(1974)]; Heaps v. Cobb , 185 Md. 372, 378, 45 A.2d 73 (1945)" . Courtney v. Board of Trustees of the Maryland State Retirement System, 285 Md. 356, 362, 402 A.2d, 385 (1979) quoting Bulluck v. Pelham Wood Apartments, 283 Md. 505, 390 A.2d 1119 (1978). See also Coscan Washington Inc. v. Maryland National Capital Park and Planning Commission, 87 Md. App. 602, 590 A.2d 1080 (1991).

However, at the same time the Court of Appeals has observed:

> Judicial review of administrative action differs from appellate review of a trial court judgment. In the latter context the appellate court will search the record for evidence to support the judgment and will sustain the judgment for a reason plainly appearing on the record whether or not the reason was expressly relied upon by the trial

> court. However, in judicial review of agency action the court may not uphold the agency order unless it is sustainable on the agency's findings and for reasons stated by the agency.

United Steelworkers of America AFLCIO Local 2610 v. Bethlehem Steel Corporation 298 Md. 665, 679, 472 A.2d 62 (1984) (citing cases). See Washington National Arena Ltd. Partnership v. Comptroller, 308 Md. 370, 519 A.2d 1277 (1987).

The Administrative Procedures Act specifies the responses this Court may make to this appeal:

> (g) Decision. - In a proceeding under this section, the court may:
>
> (1) remand the case for further proceedings;
>
> (2) affirm the decision of the agency; or
>
> (3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision of the agency:
>
> (i) is unconstitutional;
>
> (ii) exceeds the statutory authority or jurisdiction of the agency;

> (iii) results from an unlawful procedure;
> (iv) is affected by any other error of law;
> (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
> (vi) is arbitrary or capricious.

Md. State Gov't. Code Ann §10-215(g)(1984 & Supp. 1991). This Section is explicit in its limitation of the circumstances under which this Court may reverse a prior decision on an administrative appeal.

The Pruitts have challenged the earlier decision on constitutional, legal and factual grounds. Clearly the United States Constitution and cases interpreting these rights are our guide on the constitutional issues. Additionally, Md. Ann. Code art. 27 §733 (1992) provides:

> A law enforcement officer may not be discharged, disciplined, demoted, or denied promotion, transfer or reassignment, or otherwise discriminated against in regard to

> his employment or be threatened with any such treatment, by reason of his exercise of or demand for the rights granted in this subtitle or by reason of the lawful exercise of his constitutional rights.

Id.

For the legal challenges including the constitutional issues, this court is bound by a substituted judgment standard. Department of Health and Mental Hygiene v. Reeders Memorial Home, Inc., 86 Md. App. 447, 586 A.2d 1295 (1991). The Court of Special Appeals has previously described the substituted judgment standard as follows:

> We may substitute our judgment for that of the agency, because illegal acts are not based on substantial evidence and must be corrected. Doctor's Hospital of P.G. County v. Maryland Health Resources Planning Commission, [65 Md. App. 656] at [sic] 667-6, 501 A.2d 1324 [1986]. When the issues in an action primarily involve questions of law, this Court must substitute its judgment for that of the agency if our interpretation of the applicable

> legal principles is different. Ramsay, Scarlett & Co., Inc. v. Comptroller of the Treasury, 302 Md. 825, 490 A.2d 1296 (1985).

Perini Services, Inc. v. Maryland Health Resources Planning Commission, 67 Md. App. 189, 201, 506, A.2d 1207 (1986). See Washington Nat'l. Arena v. Comptroller, 308 Md. 370, 378-79, 519 A.2d 1277 (1987).

The exact opposite is true for the factual challenges. When deciding the factual issues, this Court "must not substitute its own judgment for that of the agency, whose expertise is presumed but rather exercise 'restrained and disciplined judicial judgment so as not to interfere with the agency's factual conclusions.'" Shanty Town v. Department of Environment, 89 Md. App. 1, 7, 596 A.2d 1079 (1991) quoting Caucus v. [Maryland Securities) [supra] 320 Md. at [sic] [313] 324, 577 A.2d at [sic][783], 788 [(1990)] quoting Supervisor v. Asbury Methodist Home, 313 Md. 614, 625, 547 A.2d 190, 195 (1988).

When reviewing factual issues in an administrative appeal, this Court must apply a substantial evidence test. Bulluck v. Pelham Woods Apts., 283 Md. 505, 390 A.2d 1119 (1978). See Shanty Town Associates Limited Partnership v. Department of the Environment, 89 Md. App. 1, 596 A.2d 1079 (1991); Department of Health and Mental Hygiene v. Reeders Memorial Home, Inc., 86 Md. App. 447, 586 A.2d 1295 (1991); Maryland Retirement and Pension Systems v. Martin, 75 Md. App. 240, 540 A.2d 1188 (1988).

Substantial evidence in this context has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion".

Caucus Distributors v. Maryland Securities Commissioner, 320 Md. 313, 323-4, 577 A.2d 783 (1990) citing State Election Board v. Billhimer, 314 Md. 46, 58, 548 A.2d 819, 825 (1988) cert. den. 490 U.S. 1007, 109 S.Ct. 1644, 104 L.Ed2d 159 (1989); Maryland State Police v. Lindsey, 318 Md. 325, 333, 568 A.2d (1990) (citing cases).

The Standard of Review for factual issues in administrative appeals has been described in greater detail in another LEOBR case as follows:

> A reviewing court may, and should examine any inference, drawn by an agency, of the existence of a fact not shown by direct proof, to see if that inference reasonably follows from other facts which are shown by direct proof. If it does, even though the agency might reasonably have drawn a different inference, the court has no power to disagree with the fact so inferred.
>
> A reviewing court may, and should, examine any conclusion reached by an agency, to see whether reasoning minds could reasonably reach that

> conclusion from facts in the record before the agency, by direct proof, or by permissible inference. If the conclusion could be so reached, then it is based upon substantial evidence, and the court has no power to reject that conclusion.
>
> A reviewing court may, and should, examine facts found by an agency, to see if there was evidence to support each fact found. If there was evidence of the fact in the record before the agency, no matter how conflicting, or how questionable the credibility of the source of the evidence, the court has no power to substitute its assessment of credibility for that made by the agency, and by doing so, reject the fact. [emphasis added].

Warner v. Town of Ocean City, 81 Md. App. 176, 193, 567 A.2d 160 (1989) quoting Commissioner, Baltimore City Police Dept. v. Cason, 34 Md. App. 487, 368 A.2d 1067 (1977) cert. den. 280 Md. 728 (1977). See Terranova v. Board of Trustees, 81 Md. App. 1, 566 A.2d 497 (1989), General Motors Corp. v. Bank, 79 Md. App. 68, 555 A.2d 542 (1989).

The parties present the following three main issues in their respective memoranda, breaking each into multiple sub-issues for this Court's consideration:

I. Whether the decision of the hearing board is illegal.

II. Whether the decision of the hearing board is arbitrary, capricious, and not supported by substantial evidence.

III. Whether the order of Sheriff Chiuchiolo is illegal.

Having defined the standards of review under which this Court will be proceeding, each issue shall now be addressed in turn.

I. WHETHER THE DECISION OF HEARING BOARD IS ILLEGAL

The Pruitts assert that the Decision of the Hearing Board is illegal because: 1) it violated the Pruitts' free speech rights under the First Amendment of the

United States Constitution and under the LEOBR, specifically Md. Ann. Code art. 27, §733 (1992) quoted supra; 2) it violated the Pruitts' rights to Due Process under the Fourteenth Amendment of the United States Constitution and under the LEOBR, specifically Md. Ann. Code art. 27, §733 (1992), by not giving adequate notice of the charges pending against them and by finding the Pruitts guilty of conduct with which they had not been charged; 3) it violated the Pruitts' right to Equal Protection under the Fourteenth Amendment of the United States Constitution and under the LEOBR, specifically Md. Ann. Code art. 27, §733 (1992), by singling the Pruitts out from the other participants in the conduct, and 4) it violated the Pruitts' rights under the LEOBR, specifically Md. Ann. Code art. 27 §730(b)(1992), which requires that administrative charges against an officer be filed within one (1) year after the act giving rise to the charges comes to the attention of the appropriate law enforcement official.

A. First Amendment

States may not discharge employees for reasons which infringe upon the employee's exercise of his First Amendment rights. See Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). This argument of the parties presents a mixed question of law and fact to the Court.

In Brukiewa v. Police Commissioner of Baltimore City, 257 Md. 36, 263 A.2d 210 (1970), the Maryland court of Appeals first applied the balancing test for determining whether a public employee's speech is protected. This test was developed by the United States Supreme Court in Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Maryland courts have employed the Pickering test in a number of cases involving both the LEOBR and First Amendment challenges. Hawkins v. Department of Public Safety and Correctional Services, 325 Md. 621, 602 A.2d 712 (1992); DeBleeker v. Montgomery County, 292 Md. 498, 438 A.2d 1348 (1982); DiGrazia v. County Executive, 288 Md. 437, 418 A.2d 1191 (1980); Warner v. Town of Ocean City, 81 Md. App. 176, 567 A.2d 160 (1989). See also O'Leary v. Shipley, 313 Md. 189, 545 A.2d 17 (1988); Beeler v. Behan, 55 Md. App. 517, 464 A.2d 1091 (1983).

The Pruitts argued before this Court that Pickering was not applicable to the case at bar because the Pruitts' case does not involve a public employee criticizing the government, as the facts in Pickering did. Instead the Pruitts argue that the following two cases are more appropriate standards for this Court to follow: 1) Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985), which involved a Baltimore City Police Officer who performed an Al Jolson impression in blackface on his off-duty hours; and 2) Bruns v.Pomerleau, 319 F.Supp. 88 (D.Md. 1970), which involved a practicing nudist who applied for employment with the Baltimore City Police Department.

This Court disagrees with the Pruitts. While the distinction the Pruitts have attempted to draw is apparent to this

Court, these two cases do not serve the purpose well because they both involve the off-duty actions of law enforcement officials. The Pruitts conduct unbecoming occurred while they were on duty at the Sheriff's Department. Both cases cited by the Pruitts rely to some degree on the Pickering test. In Berger the Court stated: "While the Pickering test therefore emerged from a general fact pattern not perfectly replicated by that presented here, its underlying constitutional principles are nevertheless perfectly apposite and necessarily controlling here as well." Berger, at 997.

Returning then to our analysis, in Pickering the Supreme Court stated the applicable test as follows:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon

> matters of public, concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, 817 (1968).

The Court of Special Appeals has specifically noted that before employing the balancing test, it must first be determined whether the speech at issue relates to a matter of public concern.[2] Warner v. Town of Ocean City, 81 Md. App. 176, 567 A.2d 160 (1989) This determination requires consideration of "'the content, form and context of the statement, as revealed by the whole record.'" Id. at 185, 567 A.2d at 164 quoting Connick v. Meyers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

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[2] In Rosenbloom v. Metromedia, 403 U.S. 29, 91 S. Ct. 1811, 29 L.Ed.2d 296, (1970), a defamation case in which First Amendment protection was extended to all matters of public concern without regard to the notoriety of the individual involved, public concern was described as a "vital interest" of the public in the particulars of an event or other circumstances such as the enforcement of criminal laws. Id. at 43 91 S.Ct. at ___, 29 L.Ed.2d at 311-12.

This Court agrees with the Sheriff's Department that the Nazi-like conduct of the Pruitts did not constitute speech on an issue of public concern. Substantial evidence, defined supra, was presented to the Hearing Board enabling the Board, as a collective reasoning mind, to reach this same conclusion, as it apparently did. Both of the Pruitts testified before the Hearing Board that the behavior was intended as a joke. Hearing Board Transcript, at 791-4. Sergeant Pruitt testified that the conduct was "done in private settings as imitations of the

Hogan's Heroes comedy series of the 60's." Hearing Board Transcript, at 791. Books found in Major Pruitt's office evidence a personal interest in Nazi Germany and, while the public has a general interest in historical events, the manner in which Major Pruitt acted out his personal interest during his on-duty hours cannot be described as a matter of public concern.

This Court additionally finds relevant the reasoning contained in the recent Court of Appeals case, Hawkins v. Department of Public Safety and Correctional Services, 325 Md. 621, 602 A.2d 712 (1992). It should be noted at the onset that this case involves the words of a probationary prison guard during off-duty hours while the officer was out of uniform. These are not the facts this Court finds analogous.

In Hawkins, the guard directed abusive words at a bank teller when a problem arose in the course of cashing a check. The Court of Appeals cited Pickering, Connick, and Rankin, supra, as applicable but not analogous. The Court quoted from a relevant United States Supreme Court decision:

> When employee expression cannot be fairly considered as relating to any matter of political, social or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

Hawkins v. Department of Public Safety and Correctional Services., 325 Md. 621, 602 A.2d 712 (1992) quoting Connick v. Meyers, 461 U.S. 138, 146-7, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708, 719 (1983).

Connick involved an Assistant District Attorney who, when faced with a possible transfer to a different department, drafted an internal questionnaire concerning such things as departmental transfer policies. The attorney was consequently terminated. The Supreme Court found the discharge an appropriate action saying that in this instance, the individual's First Amendment rights were outweighed by the employer's need to prevent disruptions in the work environment.

The Court of Appeals then held that Hawkins' speech was personal and that the employer's interest in maintaining calm in the penal system was potentially threatened by Hawkins' outburst in the comparatively tranquil environment of the bank. This potential was sufficient basis, the Court said, to discharge Hawkins from employment.

This same potential to create tensions and possible reactions exists in the Pruitts' case. The potential is increased by the fact that their acts have occurred during the course of their employment. While the Pruitts considered their actions to be in good fun, others may not perceive the acts in the same way, as evidenced by the public reaction to The Baltimore Sun articles. The Sheriff's Department did not have to wait until a disturbance in fact resulted from the Nazi-like conduct to discipline the Pruitts.

Having determined, therefore, that the speech at issue is not one of public concern, this Court need proceed no further to apply the Pickering test. Arvinger v. Mayor and City Council of Baltimore, 862 F.2d 75, 79 (4th Cir.

1988). Applying the substituted judgment standard, defined supra, and accepting the Hearing Board's determination that the speech was not one of public concern, this Court finds that the Hearing Board did not illegally violate the Pruitts' First Amendment rights.

B. Due Process

The Pruitts allege as the basis of this challenge that they were not properly notified of the charges filed against them and were found guilty of conduct with which they were not charged. This challenge simultaneously raises legal and factual issues.

Md. Ann. Code art. 27, §730(a)(1992) requires that where the investigation of a law enforcement officer results in a recommendation of action which would be considered a punitive measure, "the law enforcement agency _shall_ give notice to the law enforcement officer that he was entitled to a hearing on the issues by a hearing board. The notice _shall_ state the time and place of the hearing and the issues involved." (emphasis added) _Id._ This Court notes the mandatory language of this provision.

With respect to the first allegation, that they were not properly notified of the charges, the Pruitts argue that while they received charges listing the departmental rules they allegedly violated, there was no indication of which specific rule or regulation they had breached. They further state there was no statement of the facts which allegedly constituted a violation. Finally, the Pruitts argue the two conduct unbecoming charges fail to state which conduct was unbecoming. This Court shall use a substantial evidence test, supra, for these issues.

The Pruitts' first argument makes little sense to this Court both on its face and upon examination of the charging document. Where a rule is referenced in the charges, that rule is clearly the specific rule which has been violated. Substantial evidence supports this conclusion.

As for both the second and third arguments, the Departmental Findings of Fact and Amended Departmental Findings of Fact have already been set forth, supra. The definition of conduct unbecoming has also been quoted, supra, from the Howard County Sheriff's Department's General Order Manual. As high-ranking officers in the Sheriff's Department, both of the

Pruitts undoubtedly had access to the Manual and probably had first hand knowledge as well of the meaning of conduct unbecoming. The Findings of Fact and Amended Findings of Fact state that the Pruitts each disobeyed orders and engaged in Nazi-like behavior and that the Sheriff's Department found the Pruitts' behavior unbecoming and inappropriate. Applying the substantial evidence test, this Court finds there was sufficient basis for the Hearing Board to reasonably conclude that the Pruitts received adequate notice of the facts constituting a violation and the conduct deemed unbecoming.

The case at bar is clearly distinguishable from Reed v. Mayor and City Council of Baltimore, 323 Md. 175, 592 A.2d 173 (1990), a recent case in which the Court of Appeals found that a police officer had not received proper notice of the charges in an LEOBR proceeding. The Pruitts received sufficient notice of the pending charges to enable them to prepare for the Hearing Board proceedings.

Having reached this conclusion on the first Due Process issue raised by the Pruitts, their second issue essentially becomes moot. The Pruitts were each found guilty of one conduct unbecoming charge. This Court has already concluded that the Pruitts had adequate notice that they had been charged with conduct unbecoming. The Pruitts, therefore, were not found guilty of conduct with which they were not properly charged. This finding is supported by substantial evidence.[3]

Using the substituted judgment standard defined supra and relying upon the factual conclusions of the Hearing Board, this Court finds that the Pruitts' Due Process Rights were not violated through the Hearing Board's Decision.

C. Equal Protection

The Pruitts argue in their Memorandum that a number of the Sheriff Department's employees had participated in the Hogan's Heroes mimicry to varying degrees and that the disparate treatment they have received as compared with these other employees violates their Equal Protection Rights under the Fourteenth Amendment. The Pruitts cite authority outside of Maryland and outside the Fourth Circuit in support of their argument.

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[3] The Court shall address the apparent inconsistencies in Sheriff Stonesifer's testimony later in this opinion.

Both Memoranda submitted by the parties refer to how the testimony before the Hearing Board supported their respective positions. A review of the record causes this Court to reach the conclusion that while it is unclear to what, if any, extent other deputies in the Sheriff's Department participated in the Nazi-like behavior, it is clear that both Major Pruitt and Sergeant Pruitt each engaged in this behavior with some degree of frequency over an extended period of time.

The Equal Protection Clause requires that similarly situated individuals be treated in the same way. Rational basis is the usual standard for judicial review of equal protection issues where fundamental rights or suspect classifications are not involved. Hill v. Baltimore County, 86 Md. App. 642, 656, 587 A.2d 1155 (1991) citing Board of Supervisors of Elections of Prince George's County v. Goodsell, 284 Md. 279, 286, 396 A.2d 1033 (1979). While normally employed as a challenge to a legislative enactment, an equal protection challenge that fails under the rational basis test requires presentation of only some facts reasonably demonstrating the basis for the distinction, even if some inequity may result. See Briscoe v. Prince George's County Health Department, 323 Md. 439, 593 A.2d 1109 (1991); Whiting-Turner Contract Co. v. Coupard, 304 Md. 340, 499 A.2d 178 (1985).

In the case at bar, the testimony before the Hearing Board clearly established that the Pruitts engaged in

Nazi-like behavior on numerous occasions and failed to conclusively establish that other members of the Sheriff's Department ever participated. Even if it may be said that the testimony showed other deputies mimicked the Hogan's Heroes characters, the testimony in support of this contention showed others participated, if at all, to a lesser extent than the Pruitts. When it is additionally considered that the Pruitts were second and third in command in the Sheriff's Department, ample facts have been provided to show a rational basis for investigating and charging only the Pruitts. Under the substituted judgment standard of review, defined supra, this Court therefore rejects the Pruitts' equal protection argument.

D. Statute of Limitations

Md. Ann. Code art. 27 §730(b) (1992) states:

> (b) Limitation of Actions.--- (1) Administrative charges may not be brought against a law enforcement officer unless filed within 1 year after the act that gives rise to the charges comes to the attention of the appropriate law enforcement agency official.

Id. This Court's review of the Pruitt's statute of limitations argument requires application of the substantial evidence test, described supra, since when the statute of limitations began to run is an issue of fact.

The Pruitts note in their Memorandum that the charges filed against them in August of 1990 allege the Pruitts engaged in a "course of conduct" which they had been twice ordered to discontinue and which they nevertheless proceeded to practice. The Pruitts argue that since Md. Ann. Code §730(b)(1992) became effective in July, 1988 and charges were not filed by July, 1989, the current proceedings were barred by the statutorily prescribed limitations period. The Sheriff's Department argues that Sheriff Stonesifer was not aware of the acts giving rise to the charges until the spring of 1990 and that therefore the proceedings were not barred by the statute of limitations because charges were filed within one year following the knowledge.

Under the substantial evidence test, described supra, this Court must accept the Hearing Board's conclusion as to when the Sheriff's Department was aware of the conduct giving rise to the charges if there is evidence which would allow a reasoning mind to reach the conclusion the

Board did. In addition, this Court must accept any inference drawn by the Hearing Board as long as the inference follows from other facts shown by direct proof.

The Hearing Board did not find that the proceedings were barred by the statute of limitations even though this issue was before it. In its Memorandum to Sheriff Chiuchiolo, the Hearing Board said Major Pruitt "also admits his participation in such behavior as late as March, 1990." Memorandum to Sheriff Chiuchiolo, January 7, 1991, at 2.

It is true that Sheriff Stonesifer admitted to having spoken to the Pruitts about the Nazi-like conduct in 1988. He testified that his directive to stop the conduct at that time arose from a complaint he received from another employee. Hearing Board Transcript, at

94-6. Nevertheless, it appears to this Court that a reasoning mind could have reached the conclusion that the Sheriff's Department was not aware of the frequency and magnitude of the Pruitts' conduct until The Baltimore Sun articles appeared in the spring of 1990. It was through these articles that the conduct was characterized as one bringing disrepute to the Sheriff's Department due to its unbecoming nature. Based upon these facts and the testimony presented, the Hearing Board could have reasonably reached the conclusion that the proceedings were not barred by the statute of limitations set forth in Md. Ann. Code art. 27, §730(b) (1992).

Having therefore addressed the arguments presented on the first main issue, this Court finds that overall, under the substituted judgment standard, the Decision of the Hearing Board was legal. The Decision did not violate the Pruitts' constitutional rights under either the First or the Fourteenth Amendments. Applying a substantial evidence test to the factual issues, this Court has found that the Hearing Board had sufficient relevant evidence upon which it could reasonably reach the conclusions it did.

II. WHETHER THE DECISION OF THE HEARING BOARD WAS ARBITRARY, CAPRICIOUS AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

In support of the second main challenge, the Pruitts present arguments on three main points: 1) The charge of conduct unbecoming of which the Pruitts were found guilty related to an alleged violation of a departmental order, a charge of which the Pruitts were found not guilty; 2) Substantial evidence was not provided to support the Hearing Board's finding that the elements for conduct unbecoming had been established; and 3) The Hearing Board failed to present sufficient findings of fact in support of its legal conclusions.

A. Relationship Bewteen Conduct Unbecoming and Violation of Departmental Order

This Court has already partially addressed this first point, supra, in its discussion of the Due Process challenges. There this Court held that Pruitts were properly charged with conduct unbecoming and were found guilty, therefore, of a violation with which they had been properly charged. The confusion created by Sheriff Stonesifer's testimony seems more properly addressed here.

Sheriff Stonesifer did testify that the first conduct unbecoming charge referred to a failure to obey a direct order. Hearing Board Transcript, at 164. Neither Pruitt was found guilty of failing to obey a direct order.

This Court finds persuasive, however, the Sheriff Department's counter-argument that the allegation of participation in Nazi-like conduct was linked to the first charge of conduct unbecoming in the Amended Charging Document and Amended Departmental Findings of Fact. The Amended Departmental Findings of Fact are divided into three paragraphs, quoted supra. The first paragraph finds the Pruitts engaged in "Nazi-like behavior ... that has been inappropriate and unbecoming." Amended Departmental Findings of Fact. The second paragraph finds that on two occasions the

Pruitts were each ordered to discontinue the Nazi-like behavior and disobeyed these orders by the superior officer. Id. The third paragraph finds that the Pruitts each, by misuse of their respective positions in the Sheriff's Department, "engaged in a course of conduct that has adversely effected [sic] the morale of the department and undermined the good order, efficiency and discipline of the department." Id.

The delineation of the paragraphs clearly connects the first charge of conduct unbecoming, the one of which both Pruitts were found guilty, to the Nazi-like behavior rather than the disobedience of an order by a superior officer, despite Sheriff Stonesifer's testimony. The Hearing Board had the Amended Departmental Charging Document and the Amended

Departmental Findings of Fact before it.

Using the substantial evidence test, defined supra, this Court finds that the Hearing Board could have reasonably reached this same conclusion this Court does through its review of these same documents. The January 7, 1991 Memorandum manifests that the Hearing Board made this connection; it says the Hearing Board finds the Pruitts guilty of engaging in Nazi-like behavior which constituted conduct unbecoming for supervisory law enforcement officials. While there was evidence connecting the first conduct unbecoming charge to disobeying the order of a supervisor, that evidence apparently was not substantial enough for the Hearing Board to reach the conclusion that disobedience of a superior's order was the proper reference. This Court declines to substitute its judgment for that of the Hearing Board.

B. Substantial Evidence

Described, supra, substantial evidence is the test which binds this Court in its review of purported factual errors in the Hearing Board's Decision. The Pruitts argue that the Hearing Board did not have substantial evidence of conduct which adversely affects the morale or efficiency of the bureau to which the officer is assigned, a requisite element of conduct unbecoming and cite Jacocks v. Montgomery County, 58 Md. App. 95, 472 A.2d 485 (1984) for this proposition.

In Jacocks, a Montgomery County Police Sergeant in charge of the Warrant and Fugitive Section went into a tirade, in which he used several expletives, in front of the Sergeant from another division and the Major when the Major indicated he was going to be implementing some changes. In making its decision the Court of Special Appeals quoted from a Pennsylvania Commonwealth Court case which defined conduct unbecoming as conduct "which adversely affects the morale or efficiency of the bureau to which he is assigned." Jacocks, at 112, 472 A.2d at 493 quoting Shannon v. Civil Service Commission of the Borough of Whitehall, 4 Pa. Cmwlth. 492,___, 287 A.2d 858, 861 (1972) quoting In re Zeber's Appeal, 398 Pa. 35, 42, 156 A.2d 821, 824-5 (1959).

The Court of Special Appeals concluded that Jacock's conduct adversely affected the morale and efficiency of the Investigative Services Bureau in part because his outburst had occurred in the presence of another officer and at least one civilian. The Court noted the significance of the fact that no emotional turmoil had prompted the outburst. The Court declined to substitute its judgment for that of the Hearing Board.[4]

This Court similarly declines to substitute its judgment for that of the Hearing Board. The Pruitts have argued that the Hearing Board heard testimony to the effect that the Nazi-like behavior had no adverse impact upon the efficiency of the Sheriff's Department. Several deputies and community leaders, however, testified that the conduct at issue was viewed as offensive. The acts occurred throughout the courthouse complex, in both private areas where other deputies were present and public areas where there were other citizens. There does not appear to this Court to be any emotional stimulus to the Nazi-like behavior except a desire to joke or mimic. This Court finds substantial evidence supported the Hearing Board's finding of conduct unbecoming.

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[4] It should be noted that the Court of Special Appeals did not adopt the definition of Conduct Unbecoming contained in Shannon, supra. Rather, it merely used the language in the Pennsylvania case to develop the rationale supporting its conclusion in Jacocks.

C. Findings of Fact

The Pruitts finally argue that the Hearing Board did not present sufficient findings of fact to support its legal conclusions. Written findings of fact consisting of a "concise statement upon each issue in the case" are required under the LEOBR, specifically, Md. Ann. Code art. 27, § 731(a) (1992).

The Pruitts assert that the Hearing Board's findings of fact are insufficient because they do not include a statement of how, or if, the Nazi-like conduct affected the morale or efficiency of the Sheriff's Department, do not state the extent to which the Pruitts' behavior interfered with the operations of the Sheriff's Department and do not define when the Pruitts' conduct came to the attention of Sheriff Stonesifer.

This Court notes that the statutory requirement is a "concise statement upon each issue in the case." Md. Ann. Code art. 27, §731(a) (1992). The Hearing Board is not required to set forth an extensive factual justification for its actions.

Having applied a substituted judgment standard of review, defined supra, this Court believes that the Hearing Board provided a sufficient factual statement in support of its conclusions. The fact that the Hearing Board did not provide facts supporting every possible tangential subject is of no matter. This Court rejects as inapplicable the equal protection argument advanced by the Pruitts on this issue in their Supplemental Memorandum. cf. Baltimore Gas & Electric Company v. Heintz, 760 F.2d 1408 (4th Cir. 1985).

With respect to the first purported omission, namely facts showing how the conduct interfered with morale or efficiency, this Court has previously stated that it does not believe the Court of Special Appeals has adopted the definition of conduct unbecoming apparently accepted in Pennsylvania. See Jacocks v. Montgomery County, 58 Md. App. 95, 472 A.2d 485 (1984).

As to the second allegation

concerning facts to show how the Pruitts' behavior interfered with the operations of the Sheriff's Department, this Court believes this issue need not be addressed where, as here, the speech involved is found not to be protected by the First Amendment. The Hearing Board did not need to proceed further with the Pickering test once it reached this conclusion. See Arvinger v. Mayor and City Council of Baltimore, 862 F.2d 75 (4th Cir. 1988).

Finally, with respect to the issue of when Sheriff Stonesifer became aware of the Nazi-like conduct, the Hearing Board January 7, 1991 Memorandum refers to testimony presented. Major Pruitt's admission that the conduct occurred as late as March, 1990 and Sergeant Pruitt's testimony that he never attempted to stop this behavior are both noted. Memorandum to Sheriff Chiuchiolo, January 7, 1990, at 2. This Court understands these comments by the Hearing Board amidst its brief factual statement to mean the Board concluded that Sheriff Stonesifer did not fully know the nature of the conduct until the spring of 1990 when The Baltimore Sun articles were published. The Hearing Board based this conclusion upon substantial evidence before it. This Court declines to substitute its judgment for that of the Hearing Board.

In summary, this Court finds that the Decision of the Hearing Board was not arbitrary and capricious and was in fact supported by substantial evidence. The Amended Departmental Charging Document and Amended Departmental Findings of Fact sufficiently linked the allegation of participation in Nazi-like conduct to the first conduct unbecoming charge to cause the Hearing Board to reach this conclusion. The Hearing Board provided legally sufficient findings of fact to support its conclusions.

III. WHETHER THE ORDER OF SHERIFF CHIUCHIOLO WAS ILLEGAL

In support of their final challenge, the Pruitts present five bases upon which this Court could deem Sheriff Chiuchiolo's order illegal: 1) The Order punished the Pruitts for the exercise of constitutionally protected speech; 2) Sheriff Chiuchiolo did not have the power to increase the Board's recommended punishment; 3) the order violated the Pruitt's Procedural Due Process Rights; 4) the order uses punitive action to effectuate administrative policies and was based upon consideration of inappropriate factors; and 5) the Order violated the

Pruitt's rights to equal protection.

A. First Amendment

Given this Court's previous determination that the Pruitts' Nazi-like behavior did not constitute constitutionally protected speech, it follows that this Court cannot find Sheriff Chiuchiolo's Order punished the Pruitts for the exercise of their First Amendment rights under the United States Constitution and the LEOBR, specifically Md. Ann. Code art. 27, 733 (1992). Under the substituted judgment standard this argument advanced by the Pruitts must fail.

B. Sheriff Chiuchiolo's Powers

Proceeding, then, to the second sub-issue raised by the Pruitts, this Court believes Sheriff Chiuchiolo did have the power to increase the punishment recommended by the Hearing Board. The LEOBR provides in pertinent part:

> (b) After the disciplinary hearing and a finding of guilt, the hearing board may recommend punishment as it deems appropriate under the circumstances, including but not limited to demotion, dismissal, transfer, loss of pay, reassignment, or other similar action which would be considered a punitive measure.
>
> (c) The written recommendations as to punishment are not binding upon the chief. Within 30 days of receipt of the hearing board's recommendations, the chief shall review the findings, conclusions, and recommendations of the hearing board and then he shall issue his final order. The chief's final order and decision is binding and may be appealed in accordance with this subtitle. Before the chief may increase the recommended penalty of the hearing board, he personally shall review the entire record of the hearing board proceedings, shall permit the law enforcement officer to be hears and shall state the reason for increasing the recommended penalty.
>
> (d) (1) Notwithstanding any other provisions of this subtitle, the decision of the hearing board, both

> as to findings of fact and punishment, if any, if final:
>
> (i) If a chief is an eyewitness to the incident under investigation; or
>
> (ii) If an agency or its superior governmental authority has agreed with an exclusive collective bargaining representative recognized or certified under applicable law that the decision is final.

Md. Ann. Code art. 27, §731 (1992).

The Hearing Board recommended demotion, payment of a fine and counseling in this instance even though, as the Pruitts have pointed out, it had the option of choosing dismissal.

While it is true that the Hearing Board - not Sheriff Chiuchiolo - heard the testimony and therefore had the fullest opportunity to judge the credibility of the witnesses, Md. Ann. Code Art. 27 §731(c)(1992) specifically provides that the Hearing Board's recommendations are not binding upon Sheriff Chiuchiolo.

Furthermore, there follows in this same paragraph, a delineation of the procedure to be adhered to in the event that a chief desires to increase the Hearing Board's recommendation for punishment. In keeping with the statutory requirements, Sheriff Chiuchiolo personally reviewed the entire record. Final Order of Sheriff Chiuchiolo, February 5, 1991, at 3. Sheriff Chiuchiolo advised the Pruitts of his intent to increase the recommendations by letter dated January 22, 1991. He met with the Pruitts and their counsel on January 29, 1991 to provide each of them with an opportunity to present facts and arguments in opposition to the proposed increase. Finally, Sheriff Chiuchiolo set forth the reasons for increasing the penalty, quoted supra. Sheriff Chiuchiolo complied with all the statutory limitations upon his power to increase the Hearing Board's recommendations.

The provisions of Md. Ann. Code art. 27, §731(d)(1)(i) (1992) did not prevent Sheriff Chiuchiolo from reviewing and increasing the recommendations. Sheriff Stonesifer did testify before the Hearing Board. Sheriff Stonesifer was a chief. But Sheriff Stonesifer and Sheriff Chiuchiolo are not one in the same person. Even though they held the same office at various times - they are distinct individuals. Sheriff Chiuchiolo did not testify before the Hearing Board.

This Court believes that the Md. Ann. Code art. 27, §731 (d) (1) (i) is designed to prevent a chief from both testifying as an eyewitness and meting out the punishment. The purpose would be to maintain the imposition of the punishment as a fair and objective process by preventing the chief from having the final say in the matter when he has had previous opportunity to indicate his position. See Maryland State Police v. Ziegler, 85 Md. App. 272, 583 A.2d 185 (1991). Since Sheriff Chiuchiolo did not participate as an eyewitness in the proceedings before the Hearing Board, it was proper for him to review the Hearing Board's recommendations and increase the recommended punishment where he felt the situation warranted such action even though Sheriff Stonesifer had testified. The purposes of the provision were served in this instance by permitting Sheriff Chiuchiolo to review the Hearing Board's recommendations. Applying the substituted judgment standard as defined supra, this

Court concludes that Sheriff Chiuchiolo acted within his powers when he increased the punishment.

C. Procedural Due Process

The Pruitts next allege that their procedural due process rights have been violated through Sheriff Chiuchiolo's participation in the LEOBR proceeding. The Pruitts cite no Maryland cases in support of their position. Md. Ann. Code Art. 27 §731(c)(1992) sets forth the procedure which must be followed before a client may increase the recommendation of the Hearing Board. The Pruitts have given no indication that the prescribed procedures set forth in Md. Ann. Code art. 27, § 731(c) (1992) were not adhered to.

The Pruitts argue that their procedural due process rights were violated because Sheriff Chiuchiolo indicated a predisposition to terminate the Pruitts and because he engaged in an ex parte communication after the Hearing Board proceedings and before he made his decision to determine whether or not he should increase the Hearing Board's recommendations for punishment. This argument raises both legal and factual issues for this Court.

This Court finds it is unclear from the record submitted that Sheriff Chiuchiolo was truly predisposed to increase the Hearing Board's recommendation. The Sheriff's Department argues that there are simply no cases stating that an official charged solely with imposing a penalty, after conviction by a separate body, must be absolutely impartial. This court agrees.

Using the substantial evidence test, this Court finds that a reasoning mind could have reasonably reached the conclusion that there was no predisposition. There is some evidence - in the form of affidavits - that ex parte communications concerning the case occurred. However, since there is no indication in record that Sheriff Chiuchiolo failed to adhere to the procedural requirements for increasing a recommendation set forth in Md. Ann. Code art. 27, §731(c) (1992), this Court will not substitute its judgment for that of the agency and find a predisposition existed.

Using the substituted judgment standard together with the factual conclusions of the Hearing Board, this Court finds that the Pruitts' procedural due process rights were not violated through Sheriff Chiuchiolo's Order.

The Pruitts assert as an aside that Md. Ann. Code art. 27, §731(c) (1992) is unconstitutional because it permits a chief who has not heard testimony and had the opportunity to assess credibility to alter the recommendation of the Hearing Board which did have such an opportunity. The Pruitts cite Maryland State Police v. Zeigler, 85 Md. 272, 583 A.2d 1085 (1991) for the proposition that administrative agencies are required to act in accordance with basic tenets of fairness, a requirement which the Pruitts say is violated by Md. Ann. Code art. 27, §731(c) (1992).

This Court finds, however, that since this LEOBR section specifically requires the chief to review the Hearing Board's record and give the individual(s) involved an opportunity to be heard before increasing the recommendation, it is not constitutionally unfair. The statute as worded assures that before an individual's rights are further compromised by any action on the part of the chief, the substance of past proceedings and any relevant facts not present in this record will be presented to the chief for his consideration. Md. Ann. Code art. 27, §731(c) (1992) is not unconstitutional.

D. Punitive Actions

The Pruitts next argue that Sheriff Chiuchiolo impermissibly used punitive actions to effectuate administrative policies and based his decision upon consideration of inappropriate factors. This Court finds this argument conflicts with previous arguments and authority advanced by the Pruitts.

In their Memorandum the Pruitts cited Jacocks v. Montgomery County, 58 Md. App. 95, 472 A.2d 485 (1984) for the proposition that conduct unbecoming is any conduct "which adversely affects the morale or efficiency of the bureau" to which the officer is assigned. Id. at 112, 472 A.2d at 493. This Court has already noted that this definition was derived from a Pennsylvania case and that the Court of Special Appeals did not specifically adopt this definition of conduct unbecoming in Jacocks but rather merely used it in its rationale. This Court shall do the same here.

In his final order, Sheriff Chiuchiolo justifies his increase of the recommendation in part by describing the impracticality of reintegrating the

Pruitts with the Department. Certainly this reasoning shows adverse impact upon the morale and efficiency of the Department stemming from the findings of guilty on the conduct unbecoming charge for engaging in Nazi-like behavior.

The definition of conduct unbecoming in the Howard County Sheriff's General Order Manual refers to behavior "which tends to undermine the good order, efficiency, or discipline of the department." Id. There is a distinction between "behavior which tends to show", as in the Maryland definition, and "behavior which is", as in the Pennsylvania version of the same. "Behavior which tends to show" is a lesser standard.

Using a substantial evidence test, this Court believes that after reviewing all the testimony and evidence presented, Sheriff Chiuchiolo could have reasonably reached the conclusion that an increase in the recommendations was warranted based upon the reasoning that the acts had caused such public turmoil and tended to interfere, with the efficient operation of the Department to an extent that the Pruitts could not be easily re-integrated. Sheriff Chiuchiolo's increase of punishment therefore was not a punitive action designed to effectuate administrative policy and was not based upon consideration of inappropriate factors.

E. Equal Protection

Finally, the Pruitts argue that Sheriff Chiucholo's Order violated the Pruitts' Equal Protection rights under the Fourteenth Amendment and the LEOBR, specifically Md. Ann. Code art. 27, §733

(1992). As noted previously in response to the Equal Protection challenge to the Hearing Board's Decision, the fact that others may have participated in the Hogan's Heroes mimicry does not prevent the Pruitts from being found guilty of and punished for these acts. The same authority may be cited here. See. Hill v. Baltimore County, 86 Md. App. 642, 587 A.2d 1155 (1991) citing Board of Supervisors of Election of Prince George's County be(sic) Goodsell, 284 Md. 279, 396 A.2d 1033 (1979); Briscoe v. Prince George's County Health Department, 323 Md. 439, 593 A.2d 1109 (1991); Whiting-Turner Contract Co. v. Coupard, 304 Md. 323, 499 A.2d 178 (1985).

Sheriff Chiuchiolo had before him the Hearing Board record. The record included testimony establishing that the Pruitts frequently and for an extended period of time engaged in Nazi-like behavior which constituted conduct unbecoming. This Court has already noted that the testimony concerning the degree, if any of the participation of other deputies was far less clear. When the superior positions of the Pruitts in the Department are considered together with this testimony, the fact that Sheriff Chiuchiolo has not charged any other deputies with conduct unbecoming for Nazi-like behavior does not lead this Court to the conclusion, using the substituted judgment standard as defined supra, that the Pruitts' equal protection rights have been violated.

This Court finds based upon the foregoing that Sheriff Chiuchiolo's order was legal. The Order did not violate the Pruitts' right to free speech, Due Process or Equal Protection. Furthermore, Sheriff Chiuchiolo acted fully within his statutorily prescribed powers and did not engage in punitive action, based upon inappropriate factors, in order to effectuate administrative policy.

In conclusion, this Court shall defer to the joint Decision of the Hearing Board and Order of Sheriff Chiuchiolo. Both the Decision and the Order are legal. The Hearing Board did not act in an arbitrary and capricious manner. Substantial evidence supported its findings. This Court finds that the Decision of the Hearing Board and Order of Sheriff Chiuchiolo are sustainable on their respective findings of fact and for the reasons set forth in the written memoranda.

THEREFORE, it is this 15th day of

May, 1992, by the Circuit Court for Anne Arundel County, .

ORDERED, that the decision of the Hearing Board and the Final Order of Sheriff Chiuchiolo be, and the same are hereby affirmed; and it is further

ORDERED, that the Appellants are to pay the costs of these proceedings.

/s/
EUGENE M. LERNER
Judge

cc: Clark F. Ahlers, Esquire
Sharon E. Haynie, Esquire
Mark H. Bowen, Assistant Attorney General

Michael A. Chiuchiolo, Sheriff

Charles M. Cave, Chief Deputy

313-2150

Howard County, Maryland
Court House
Ellicott City, Maryland 21043

February 5, 1991

RE: Howard County Sheriff's
Office
vs.
Major Donald L. Pruitt
Sgt. Dennis L. Pruitt
MSP Case #NAI-38

FINAL ORDER OF THE SHERIFF

Major Donald Pruitt as 2nd in Command was the de facto leader of the Sheriff's Office, and Sgt. Dennis Pruitt was the 3rd in Command, if not by seniority, by position.

Major Donald Pruitt and Sgt. Dennis Pruitt were tried in this case and on Dec 12, 1990, were found guilty by the Trial Board of "Conduct Unbecoming an Officer".

On January 3, 1991, a Phase II Disciplinary Hearing was convened by the Trial Board, and on January 7, 1991, they recommended that each of you receive a demotion of one rank, a $200 fine, and counseling.

On January 22, 1991, you were notified by letter that I would afford each of you a hearing before me as provided by Article 27, Section 731, Annotated Code of Maryland (ACM).

On January 29, 1991, each of you were afforded a hearing with counsel before me to present any reasons why I should not increase the penalty for your actions.

The facts support that the unbecoming conduct clearly was initiated by you and continued over at least an eight year period.

Of paramount concern is the undisputed fact that both of you, as leaders of the Department, initiated, fostered, and condoned this activity. Your example led to some subordinates also participating in the activity. At no time did you recognize the implications or sensitivity of your actions; nor did you make an attempt to cease the actions on the part of yourselves or your subordinates.

In addition, these actions took place on duty, in the uniform of the Sheriff's Office, and sadly, in the building that symbolizes our democratic system of justice that generations of Americans have fought so hard to preserve.

The Trial Board aptly described your actions as "offensive, outrageous, and conduct unbecoming supervisory law enforcement officials in the work environment".

AS a direct result of your actions, you have fractured the infrastructure of the Sheriff's Office, brought the Department into disrepute and outraged the citizens of Howard County.

To accept the Trial Board's recommendations and integrate you back into the organization even as deputies, let alone as supervisors, would demoralize the employees, seriously hamper the efforts to rebuild the supervisory structure, and change the direction and attitudes envisioned as necessary to instill a new sense of internal pride and community respect.

As an example of how your actions affected this Department, the Circuit Court which this Department serves, and the citizens of Howard County, one need only look at the media coverage of your actions and the many letters and expressions of outrage from community leaders.

Law Enforcement Officers are required to carry out their duties in a totally fair and impartial manner and must not give the appearance of supporting, even in jest, activities and actions which represent a low point in the history of mankind - the Nazi terror. The offensiveness of such actions remains today totally abhorrent to people who were themselves victims of the Nazi terror or had relatives there, or had friends or relatives who fought to eliminate this Nazi terror.

In accordance with Article 27, Section 731 (c), ACM, I have reviewed the entire records made before the Trial Board. Specifically, I have reviewed the entire transcripts and have reviewed every piece of documentary evidence offered and accepted into evidence before the Board. Likewise, I have carefully reviewed the findings and recommendations of the Board. In particular, I have considered carefully the facts which the Board thought mitigated your punishment.

By letter of January 22, 1991, I advised each of you that I was considering increasing the recommended penalty in accordance with Article 27, Section 731 (c), AMC,; I would permit each of you to appear before me personally with counsel and present any reasons, facts, or arguments you wished as to why the penalty should not be increased.

You both met with me accompanied by your attorney on January 29, 1991. I gave each of you an opportunity to present any such facts or arguments. In addition, our meetings of January 29th were tape recorded, and I have reviewed those tapes.

For the reasons set forth herein above, you are hereby advised that effective February 6, 1991, your employment with the Howard County Sheriff's Office is terminated.

You are to return to the Sheriff's Office all uniforms, equipment, and other property which you may now have.

So that the record will be clear, I specifically reject the suggestion of the Trial Board that I am precluded from

making the final decision.

Article 27, Section 731 (c), ACM, provides that the decision of the Trial Board is final and may not be changed only if the Chief is an eyewitness to the incident under investigation. Accepted rules of statutory interpretation in Maryland provide that words are to be given their normal dictionary definitions unless the context in which the word is used indicated otherwise.

Webster's 9th New Collegiate Dictionary defines "eyewitness" as "one who sees an occurrence or an object".

At no time in my service as a member of the Howard County Police Department did I ever personally observe any such conduct on your part. Likewise, since leaving the Howard County Police Department and up to today, I personally have never observed any such conduct on the part of either of you.

Therefore, I, as the "Chief" and not having been an eyewitness to any of your actions, have made this decision.

The fact that former Sheriff Stonesifer may have personally observed such conduct is irrelevant. I am the Sheriff and the final decision is mine under the law.

Totally separate and apart from the proceedings under the Law Enforcement Officers Bill of Rights (LEOBR), deputies of this Department serve at the pleasure of the Sheriff. Other than proceeding under LEOBR, no deputy enjoys any job security; has any expectation of continued employment; and no provision of the laws of the State of Maryland or Howard County provide any such job security. Maryland

Appellate Courts have held that LEOBR is not a law which provides job tenure.

Separate and apart from my decision as set forth herein, it would not be beneficial to retain you as a deputy in this Department.

I am in the process of rebuilding this Department to make it responsive to the citizens of Howard County to more effectively and efficiently carry out our Departments' duties. You do not fit into my future plans for the Department. To the extent that you may believe that you are entitled to any form of hearing before I can terminate you under my authority as Sheriff, you have had now two such hearings. One before the Trial Board and another before me on January 29th. These hearings were held prior to your termination and provided you with ample opportunity to clear your name or reputation and give me any reasons why you should not be terminated.

Therefore, for the reasons stated herein, you are each terminated effective February 6, 1991 as stated herein.

/s/
Michael A. Chiuchiolo, Sheriff,
Howard County Sheriff's Office

cc: Major Donald Pruitt
Sgt. Dennis Pruitt
Michael Marshall

Raymond M. Kight, Sheriff

301-217-7000

Montgomery County, Maryland

MEMORANDUM

January 7, 1991

TO: Sheriff Michael Chiuchiolo,
Howard County

FROM: Raymond M. Kight, Chairman,
Administrative Hearing Board
Jesse Bane, Board Member
Wilson Knight, Board Member

SUBJECT: LEOBR Administrative Hearing

Respondents - Major Donald Pruitt
Sergeant Dennis Pruitt

The Administrative Hearing involving the aforementioned Respondents commenced on October 29, 1990, with subsequent hearings on October 31, November 2, 5, 8, and November 9, 1990. The hearing regarding past performance was conducted on January 3, 1991. The Board heard testimony from over fifty witnesses and received over eighty pieces of evidence.

After due deliberation and consideration of the evidence and testimony, the Board unanimously decided that both Respondents were guilty of Charge #1. Major Donald Pruitt was found not guilty of Charges #2, 3, and 4. Sergeant Dennis Pruitt was found not guilty of Charge #4: charges #2 and 3 were dismissed for lack of evidence.

This case involved conduct by the Respondents that was participated in not only by each of them, but also many members of the Howard County Sheriff's Office for a long period of time, going back through administrations of two Sheriffs. The conduct or behavior was described as Nazi behavior and/or a parody of the old television series "Hogan's

Heroes."

The organizational structure of the Howard County Sheriff's office was such that Major Donald Pruitt was the second highest ranking deputy and Sergeant Dennis Pruitt was the third highest ranking deputy, both immediately under the Sheriff.

From the testimony of Sergeant Dennis Pruitt (See Transcript, page 791/792), he admits periodically to saluting (German style) and saying German words, such as, "Achtung", "Sieg" and "Seig Heil." He participated in such behavior for ten years (page 793). Other employees of the office also participated (page 796, 797, 798). Sergeant Pruitt, being the third in command, never attempted to stop this behavior on the part of himself or other employees (page 895). Suffice to say, there is credible evidence of CONDUCT UNBECOMING by a high-level supervisor and law enforcement professional.

Major Donald Pruitt, second in command, also admits his participation in such behavior (page 934, 935) as late as March, 1990 (page 1084). Being in a leadership position, he should never have participated in behavior that was offensive and insensitive to others, especially those subordinate to him.

The evidence indicates, that in a joking way, many employees were involved in the offensive behavior. The involvement of others does not excuse, however, the Respondents' conduct. The uttering of Nazi-like phrases, saluting and clicking of heels was offensive, outrageous and conduct unbecoming supervisory law enforcement officials in the work environment.

Generally, there was no complaint until such time that the Respondents were promoted; the Respondents subsequently instituted a strict management style of accountability. Several employees of the office resented their management style and exploited their behavior in an attempt to rid the office of them.

The Board would like to point out that the charges against the respondents were brought by Sheriff Stonesifer, who was also a witness against the Respondents. Testimony indicates that he was a witness to their conduct and, on at least one occasion, participated in the offensive behavior. According to Article 27, Section 732(d)1.

> "Notwithstanding any other provisions of this subtitle. the decision of the hearing board, both as to findings of fact and punishment, if any, is

final;

> (i) If a chief is an eyewitness to the incident under investigation."

Therefore, the Board believes its recommendations are final; that the change in leadership in the Howard County Sheriff's office does not permit the new Sheriff to decide otherwise. To do so, the Board believes, would only circumvent the intent of the legislature when it enacted this provision of the LEOBR.

RECOMMENDATIONS

The Board, after deliberation, unanimously decided to recommend the following:

1) Both Sergeant Dennis Pruitt and Major Donald Pruitt be reduced in rank to the next lowest rank.
2) Both be fined in the amount of $200.00 each.
3) Both be required to undergo

counseling by a professional that addresses cultural or sensitivity awareness; and that the Howard County government determine whom this professional will be.

The Board would further recommend that the Sheriff address certain inadequacies in the conduct and attitudes of those deputies under his employ. The Board found the activities and attitudes of some deputies, to include some of those who testified against the Pruitts, to be less than professional; and it sees a great need for outside training in police discipline, sensitivity and cultural awareness, and interpersonal relationships in the work place.

cc: Michael Marshall
Lynn A. Battaglia